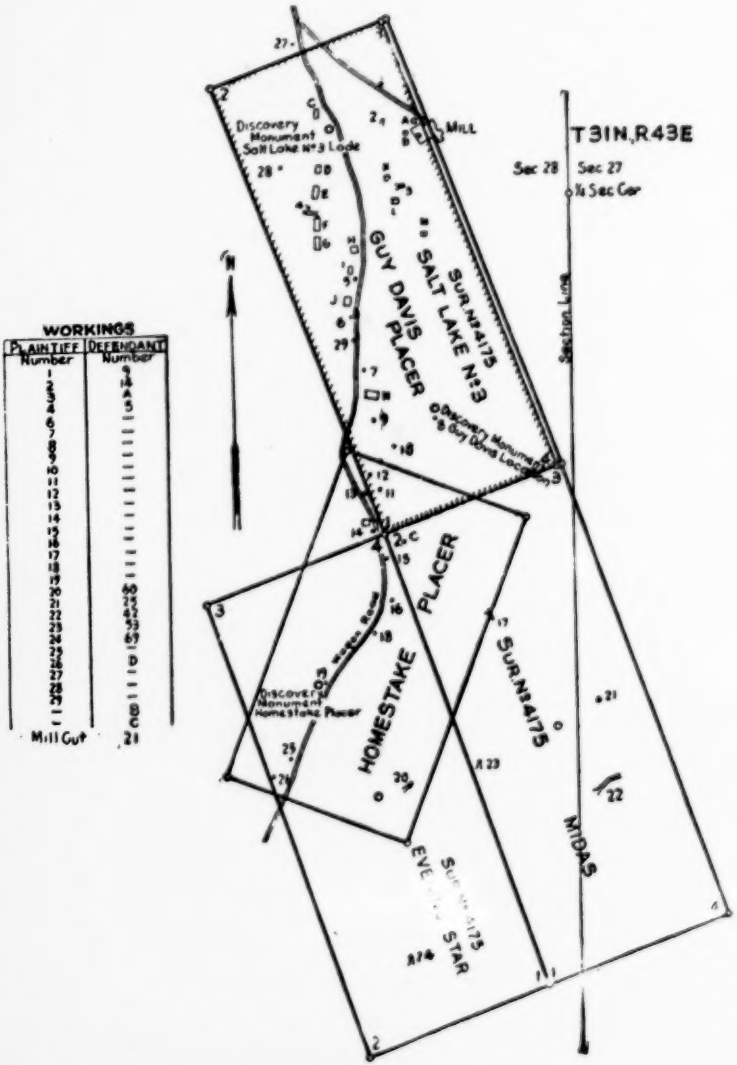


MAP OF MINING CLAIMS INVOLVED
COMPILED FROM
PLAINTIFF'S EXHIBIT "A", DEFENDANT'S EXHIBIT "5"

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# In the Supreme Court of the United States

GEORGE A. COLE ET AL.,
*Petitioners,*
vs.
JOSEPH RALPH, *Respondent.*

No. 568, Involving the Conflict of the Homestake Against the Midas and Evening Star Mining Claims.

and

GEORGE A. COLE ET AL.,
*Petitioners,*
vs.
JOSEPH RALPH, *Respondent.*

No. 569, Involving the Conflict of the Guy Davis Against the Salt Lake No. 3 Mining Claim.

## Brief for Respondent.

### STATEMENT.

A statement of the facts and questions involved, and of the character and history of the mining claims concerned, is contained in the first forty pages of our brief in the Circuit Court of Appeals, filed here as an exhibit with our memorandum against the petition for certiorari. We refer thereto to avoid repetition, and we

will later refer to certain other pages of that brief for sake of brevity here, and in amplification of the points and citation of law and fact.

Our first proposition is that the judgment of the Circuit Court of Appeals was right, independently of the facts and law of adverse possession and of U. S. Rev. Stat., Sec. 2332, upon which the opinion turned, because there were numerous other vital errors committed by the trial court which vitiated its judgments and necessitated reversal.

A number of these errors are considered in the appendix hereto, the first of which is based on the fact that the petitioners (defendants in error in that court) had and have no title to the alleged Homestake and Guy Davis mining locations, and no right of action in respect thereto, upon which the adverses in the land office and these adverse suits purport to be based, as shown by their own evidence. (See post p.....) Having no title and no right of action in respect thereto, there was no basis whatever for the verdicts and judgments awarding title and right of possession to the petitioners. And as there was no conflicting evidence on this point to give the jury latitude of decision, the Circuit Court of Appeals was bound to have reversed the trial court on this ground, had there been no other error. For the rule announced by this court in McClung vs. Silliman, 6 Wheat. 598, 5 L. Ed. 340, to the effect that the question on review is whether the judgment complained of is correct, not as to the grounds announced therefor by the court below, has never been changed in this court (Penn. R. Co. vs. R. R.

Co., 157 U. S. 225; 39 L. Ed. 682; 15 Supt. Ct. 576; Silsby vs. Foote, 14 How. 660; 14 L. Ed. 394). It is also as the court knows an axiomatic rule of decision upon review in all the appellate courts of the country. See multitude of decisions in point cited in 4 Corpus Juris, pp. 662-665, section 2557, and notes 92-99, 1-11.

> "The accuracy of the reason given is of no consequence, when the ruling itself was right" is a typical expression upon review.
>
> Young vs. Duncan, 218 Mass. 346, 351; 106 N. E. 1;
> Randall vs. P. M. Car Co., 99 N. E. 221.

The position of petitioners is much like that of a plaintiff on a note when met by a plea of *non est factum* and a denial of title in plaintiff. The court has decided against him on the issue of *non est*, and he persists in contention as to error in that ruling, when the record shows abundantly that he never acquired title to the paper.

It is like that of a divorce plaintiff whose plaint is defended by denial of the marriage relation and also by denial of the cruelty or non-support charged. The court decides against plaintiff on the latter ground when the record abundantly shows there was never a lawful marriage. No reversal could occur regardless of error in the reasons announced.

To submit a closer parallel, a junior mining claimant attacks the senior location for alleged lack of mineral discovery, or other ground of invalidity. If

the trial court or appellate court decide against him on that contention, he cannot complain, whatever his facts, if his own evidence show conclusively that he himself never had any title or claim to the ground under the junior location; that he is a mere stranger, and that the junior location, if it exists, is outstanding in the hands of others not parties to the suit. And the same would result if he be estopped by the facts to allege the invalidity complained of.

It may flavor of disrespect to the learning and ability of the accomplished lawyers who are the judges of this court to multiply citation and illustration of so fundamental a proposition, yet petitioners' plea for review in this court is based apparently in ignorance or disregard thereof. We will meet them upon their own grounds on subsequent pages hereof, but we reserve the insistence that a complainant cannot make a case for reversal by urging alleged error in the reasons or grounds announced by the lower court for the decision complained of, if there are other abundantly good and valid reasons therefor, and the decision was necessitated by the record.

## SUMMARY OF GROUNDS FOR REVERSAL.

Even could we grant that petitioners had disproved prior mineral discovery at the trial, in our lode claims, and under an issue directed thereto, still the relocators of the Guy Davis claim (claimed by petitioners under record No. 569), relocated the same under a form of notice constituting a conclusive admission by them of the validity of respondent's prior Salt Lake No. 3 location, under

the settled decisions of this court, of the Ninth Circuit Court of Appeals, and of all the mining states. While in the record No. 568, the petitioners have no title, and can trace none upon their own conveyances in the record, nor any right of possession, under the alleged Homestake locators, which they claim in opposition to respondent's Midas and Evening Star. All trace of interest or claim therein, by their own showing, had passed out of Healey and Scott, the locators of the Homestake, and never was acquired by the petitioners. They are complete strangers to the title and right of possession, no matter whether the Homestake was valid or the Midas and Evening Star. And they never tendered an issue of invalidity of the prior lode locations in their complaints, and if they had they were barred by U. S. Rev. St., Sec. 2332. Some of the petitioners never even filed an adverse claim in the land office against respondent's patent application, as required by U. S. Rev. St., Sec. 2325-2326, lack of which is jurisdictional in a mining adverse suit. And there is a fatal misjoinder of plaintiffs even upon their own contentions as to the Guy Davis relocation. And finally, they never in fact disproved prior mineral discovery in the senior lode locations, but they did substantially prove the contrary, so that the verdicts and judgments are without evidence to sustain them. They introduced illegal and incompetent testimony in conflict with the decisions of this court as well as those of the other mining jurisdictions including Nevada. They contrived to prevent proper cross-examination of their own witnesses while

on the stand for the ostensible purpose of attempting to disprove prior mineral discovery. And they secured the exclusion of a considerable amount of testimony offered by defendant to prove the existence of large and valuable lodes and veins of mineral in place, which testimony was legal and admissible not only under the decisions of Nevada and other appellate courts, but under the express admissions of the petitioners themselves in their briefs in these cases in this court. Their contentions as to what is necessary to constitute a lode or vein of mineral in place and the values at any one point therein, is contrary to the decisions of this court, but their own untenable theory and contentions on this point entered into the rulings of the trial court and the verdicts of the jury, and were perpetuated in the trial court's judgments which were reversed in the Circuit Court of Appeals. Notwithstanding these facts, most patent in the record, petitioners content themselves here with discussions upon the elementary proposition that a mineral discovery is necessary to sustain a mining location, and with efforts to repel the adjudged legal effect and operation of U. S. Rev. Stat., Sec. 2332.

In view of the foregoing, petitioners' opening statement in their brief as to the proof and contentions at the trial is quite restricted, not very illuminating nor entirely accurate. It ignores the legal presumptions of validity supporting old mining locations which have been improved and often transferred and conveyed, and also the burden of proof against a junior locator in attacking such ancient locations as those of respondent, to affirma-

tively establish lack of prior mineral discovery, if that were to be asserted as a ground of invalidity. Upon this question the materiality of evidence of existence of valuable lodes and veins at and very near the surface of the ground is elementary, as we show herein, because upon this proof the law presumes their discovery by the original locators, in aid of the location records and the presumptions of title. Even petitioners admit this principle now in their brief (pp. 32), yet they excluded a considerable amount of evidence of veins when offered by respondent, and also denied respondent the privilege of cross-examination of their own witnesses when the same facts would have been developed thereby. For which reason they are barred of dispute that valuable and locatable veins and lodes do exist at and about the surface, for a party cannot have the benefit of a contention on an issue of fact, and also exclude evidence to prove that fact. The exclusion rulings are also assigned as error.

We will in the appendix take up each of these phases of the case in their turn, and will consider the facts upon which petitioners' claim of title or right of possession to the junior locations depend. For upon this rests their whole right to be heard here. There is no question of a verdict or decided fact here to hamper the court, but the whole question turns upon their own documentary attempts to derain title to the Homestake and Guy Davis relocations. (Appendix, page 49.)

PETITIONERS' STATEMENT.

For the present, specifically, we criticise the "Statement" of petitioners' brief, as follows:

ON PAGE 2. It is true that they orally *"contended that the lode claims were void for want of discovery,"* but there was neither issue in their pleadings, nor tendency of their proof at the trial to support it. Something more than *contention* is necessary to make a case.

PAGE 2. Respondent did not introduce testimony of parties (Clive and Farren) who had made the lode locations * * * as to the original lode discoveries, for they were long dead or disappeared. The two Jory brothers who as employees of Clive did the posting and monumenting of the Salt Lake No. 3, testified for respondent that they saw the vein in the original discovery cut (which had been previously opened), and their uncontradicted testimony sustained the location in the matter of mineral discovery. (See infra pp. 118)

Joseph Jurey likewise saw the Midas and Evening Star discoveries previously made by Farren or some one else on the ground, being employed by Farren to post and monument the ground, and while he filed the location notices in his own name, he did it as agent and trustee for Farren, who designated the ground to be located and to whom he soon thereafter conveyed it. (Infra p. 126)

Jurey's uncontradicted testimony sustains the sufficiency of the original discoveries on those claims.

PAGES 2-3. Respondent did not "contend that the

local statute of limitations of Nevada * * * operated as a statute of repose, as claimed by petitioners. Our contention was and is that U. S. Rev. Stat., Sec. 2332, furnishes the repose, and that the Nevada statute (quoted on page 7 of petitioners' brief) merely fixes the time, and thereby supplements said Sec. 2332. This is discussed infra p. 22 There is no conflict between the Federal and state statute as suggested by petitioners, unless it be in this respect, viz.: Whereas Sec. 2332, R. S., provides only for *holding and working*, the Nevada statute adds thereto *"in the usual and customary manner of holding and working similar claims in the vicinity thereof."* If this be contended to exact some partitcular amount, kind or quality of work, or method, in excess of the requirements of Sec. 2332, R. S., it might to that extent only be considered in conflict and void. But the fixation of two years' time as authorized by Sec. 2332 would not be void. Our reliance is upon a compliance with the Federal statute for more than the two years fixed by the state statute.

PAGES 3, 5-6. They gravely argue of possible error in respondent coupling the element of mineral discovery with an instruction under U. S. R. S., Sec. 2332, in the trial court. This is merely clutching their "straw man" by the throat. No such question is presented for decision by the record or assigned by respondent. After the trial court had ruled to exclude adverse possession from the jury, one of respondent's attorneys tendered a request submitting adverse possession along with discovery which the court had permitted to go to the jury as a ground

of attack, hoping thereby to get at least a modified submission of our defense of adverse possession to the jury. The court overruled the request, and it was abandoned by the respondent. (See infra p 43

PAGE 4. Quotation is made of the trial court's statement to the jury that it appeared, and he thought it conceded, by both parties, that both the lode and the placer locations were properly made, and that practically the only question presented was whether a valid discovery had been made by the lode locators, prior, etc. No such concession had been made by respondent at the trial. In our view, the ancient lode locations holding the ground, made it impossible for the conflicting locations to have been "properly made," and all their pretended acts of location, were in the words of this court, "as if they had never been done." Belk vs. Meagher, 104 U. S. 279. The trial court quotation is about the only comforting thing in the record for petitioners, wherefore its position at the head of their brief. All it lacks is pleading and proof to support it.

We will now consider the question of adverse possession and U. S. Rev. Stat., Sec. 2332, about which complaint is made of the judgment of reversal entered by the Circuit Court of Appeals.

## ADVERSE POSSESSION.

The Circuit Court of Appeals reversed the trial court judgment because defendant's (respondent) title was and is protected by the operation of U. S. Rev. Stat., Sec. 2332, which provides that after possession and working for the time prescribed by the local statute of limitations (which in Nevada is two years, Rev. L. 1912, Sec. 4951), evidence thereof shall be sufficient to establish the right to a patent, and because the trial court had refused to so instruct the jury.

The extent and continuity of such actual working and possession by defendant and his grantors of the Salt Lake No. 3 mining claim (claimed by petitioners as the Guy Davis claim) is cited to the record on pages 101-105; 161-182; 488-490 of our printed brief in case No. 2952, filed here as Exhibit A against the petition for certiorari, to which we refer. While that as to the Midas and Evening Star mining claims (called the Homestake by petitioners) is cited to the record on pages 62-65; 114-137; 425-428 of our printed brief in No. 2953 below, filed here as Exhibit No. 1 against the certiorari. These show among other things that defendant and his grantors held and worked the Salt Lake No. 3 for nearly seventeen years before petitioners attempted to locate the Guy Davis claim upon the ground; and the Midas and Evening Star for nearly seven years before the attempted location of the Homestake; during which time the claims had been greatly improved by expensive buildings, cuts, shafts, tunnel, workings, roadway, mill, leaching tanks,

etc., upon the three lode claims themselves, and other expensive improvements and workings on the adjoining claims of the Copper Canyon group, of which said mines were a part, of value and benefit to all the claims of the group; all this representing an outlay for labor alone of more than one hundred thousand dollars. There was also ample evidence of lodes and veins on each of the claims, of which we will speak later (but see record citations in brief Exhibit A, pp. 541-591; Exhibit No. 1, pp. 482-513). Custodian and watchman constantly present residing on the ground in actual care and possession, keeping the boundary mounments up and in place and performing all annual labor; besides numerous other workmen from time to time. There was nothing "casual" about this possession and working as suggested by petitioners, but it was actual and continuous.

There is a presumption of validity of a mining claim under these circumstances which grows in strength and cogency with the age of the mining claim, and the degree or extent of the improvements, possession and working, and which finally becomes irrebuttable after the period of local limitations has run in its favor.

Petitioners do not dispute that there is such a presumption, but deny its effectiveness to prevent disputes and litigation even after the statute has run. If correct in this view, then wherein do the statutes have any operation at all? They say the statutes furnish a rebuttable presumption of validity that may be dispelled by proof (and, we presume, by suitable allegation). But that much existed before and without the statutes, and

exists now in favor of all mining claims in possession and apparently regular, before the statute has run. And so this court and all courts in the mining states have decided.

Campbell vs. Rankin, 99 U. S. 261; 25 L. Ed. 435;
Risch vs. Wiseman, 59 Pac. 1111;
2 Alaska 496;
Harris vs. Mining Co., 8 Fed. 863;
Cheeseman vs. Hart, 42 Fed. 99-102;
Vogel vs. Warsing, 146 Fed. 949;
Ware vs. White, 108 S. W., 831-4;
Gropper vs. King, 1 Pac. 755-6;
Thomas vs. Mining Co., 211 Fed. 105-7-8;
Walker vs. R. R. Co., 24 Land Dec. 172;
Mining Co. vs. Min. Co., 45 Pac. 1047-9;
Bismarck Min. Co. vs. Min. Co., 95 Pac. 14-18;
Strepy vs. Clark, 5 Pac. 111;
Jantzer vs. Copper Co., 20 Pac. 93-94;
Buffalo, etc., vs. Crump, 69 S. W. 576;
Ambergris Min. Co. vs. Day, 85 Pac. 109;
Mining Co. vs. Min. Co., 12 Nev. 312;
Same, 6 Colo. 372;
McGinnis vs. Egbert, 8 Colo. 46;
Golden vs. Murphy, 103 Pac. 394-8 (Nev.)

And see digest of these decisions on pp. 193-211, our said brief, Exhibit A. These all show that possession alone and a recorded location raises a prima facie presumption of title, validity, and due legal compliance, such as will uphold and sustain a mining claim until something is alleged and proved against it. This presumption includes of course the element of mineral discovery. The element of a mineral discovery is in-

cluded and implied in the term "valid location," as defined by this court. (Creed, etc., Min. Co. vs. Uintah, etc., Co., 196 U. S. 342-3; 49 L. Ed. 506.) And by the Calif. Supreme Court in the case of McLemore vs. Express Oil Co., 112 Pac. 59-60.) And absence of discovery cannot be proved at the trial unless tendered as an issue in the complaint. (Russell vs. Hoyt, 2 Pac. 25.)

No injustice or illegality flows from this view. For if the veins have not been discovered or known to exist, or any other legal default has occurred, a junior claimant may always prior to limitations be admitted to allege and prove it, and thereby defeat the prior location. It was never heard of that he could do so without either allegation or proof, or that by a mere *"contention"* in a brief or an argument, he can put the senior locator upon defense of his titles.

Petitioners seem to contend that not only may the junior claimants do this, but that it makes no difference in their right how long the older location has been held, how often conveyed and purchased for value, nor to what extent it or the group of which it is a part have been improved and developed, nor how closely contiguous to its side line much valuable ore has been taken out and shipped to smelter for many years. Even the statute itself does not arrest their right to overthrow such a location by a mere interrogation mark.

If this be true, then what office have the statutes (U. S. Rev. Stat., Sec. 2332 and Nev. Rev., Sec. 4951) to perform? What their end and object? And what change in or addition to the law as it stood before,

and as it stands now without them? What is to be accomplished thereby, if the same questions can be litigated after as before the bar of the statutes has run? If a mining claim may still be impeached by issue and proof, or by proof without an issue as here attempted, wherein is the situation affected by the statute? Petitioners' contention is not only in the teeth of the words of the statutes but of the decisions as well which construe the statutes. These all say that possession and working for the required time is the *equivalent of a valid location*, and there need be no proof of the original acts of location.

The decisions are digested on pp. 109-153 of our printed brief in No. 2952 below, filed here as our Exhibit A upon certiorari, to which we refer, but cite the more pertinent cases here.

U. S. Rev. Stat., Sec. 2332;
Nev. Rev. Laws, 1912, Sec. 4951;
Belk vs. Meagher, 104 U. S. 279-87; 26 L. Ed. 735;
Glacier Mtn. Min. Co. vs. Willis, 127 U. S. 471;
Reavis vs. Fianza, 215 U. S. 16-25;
Costigan Mining Law, Sec. 153, note 52;
Buffalo, etc. vs. Crump, 69 S. W. 576;
Harris vs. Equator Min. Co., 8 Fed. 863;
420 Min. Co. vs. Min. Co., 3 Sawy. 634; Fed. Cas. No. 4989;
Lindley on Mines, Sec. 865, note 3; and Sec. 688, p. 1722;
Golden vs. Murphy, 31 Nev. 395; 105 Pac. 99;
Lavagnino vs. Uhlig, 103 Pac. 394-8;
Anthony vs. Jillson, 23 Pac. 419;
Altoona Min. Co. vs. Min. Co., 45 Pac. 1047-8;

Upton vs. Santa Rita Min. Co., 89 Pac. 275-284;
Vogel vs. Warsing, 146 Fed. 949;
Risch vs. Wiseman, 59 Pac. 1111;
Snyder on Mines, Secs. 353, 672.

Especially strong are the rights of a purchaser relying upon the record. See cases infra p. 62

It may be gathered from the rule announced in Thomas vs. Mining Co., 211 Fed. 105-7-8 that the rule is stronger yet, and that even without possession and working for the period of limitations or reliance upon U. S. Rev. Stat., Sec. 2332, the presumption of mineral discovery and consequent validity may become indisputable in cases of continued possession and recorded location and transfers of title. For it was there held as follows by Judge Gilbert himself who wrote the dissenting opinion below in the cases now at bar, viz.:

> "Where a mining claim which has passed out of the hands of the original locators, has stood unchallenged for years, and has been developed to a considerable extent, the certificate of location, if in due form, may be deemed *presumptive evidence of discovery*, and of a valid location."
>
> Vogel vs. Warsing, 146 Fed. 949;
> Cheeseman vs. Hart, 42 Pac. 98.
>
> "But in the absence of such grounds for indulging a presumption in favor of the integrity of a location, it is held that the location notice is when recorded prima facie evidence only of what the statute requires it to contain (5 Pac. 111; 20 Pac. 807; 95 Pac. 14)."
>
> Thomas vs. Mining Co., 211 Fed. 105-7-8.

Now if a recorded location notice (before it is old and often transferred) containing a statutory recital of discovery is *prima facie* evidence thereof, it is the equivalent of a legal presumption, i. e., a judicial assumption of a fact from proof of some other fact. Something the court may take for granted until disproved.

And if, as his honor further held supra, when a mining claim has stood unchallenged for years, has been developed and often transferred, the location papers are presumptive evidence of discovery, then something of added legal effect must be annexed to the presumption or prima facie evidential effect of the recorded notice in the first instance, or else there is a distinction without a difference—an absurdity. The only alternative is that in the one case, the recorded notice only implies discovery when it contains the statutory recital to that effect; and in the other there is an implication of mineral discovery with or without the statutory recital thereof in the recorded notice when the location has become old, and often transferred.

However that may be, it is certain that when possession and working for the period of limitations under U. S. Rev. Stat., Sec. 2332 has been super-added to age, record and transfers the presumption of mineral discovery and valid location must become conclusive, or the statute has no operation or effect at all, and would never be pleaded or relied upon.

Petitioners criticise Judge Hunt's opinion in the Court of Appeals, in discussing the presumptions. It is possibly true that the particular excerpt from Judge

Hunt quoted in their brief, if considered alone, does not support the instruction asked, for refusal of which reversal was ordered. In that, it recognizes the possibility of admission of proof to displace the presumption of discovery, while the instruction asked does not. But it must be remembered there were two defenses in our answers, and a somewhat different presumption appertains to each. The first defense was that of regular mining location, which being established prima facie, carries a presumption of discovery and validity—rebuttable it is true, but still a presumption. The second, that of *valid location* or the equivalent thereof, under Sec. 2332 and the decisions of this court construing it; which in legal effect fortified the prior presumption into an irrebuttable one. The excerpt quoted from Judge Hunt had evident reference to the first class of presumptions under our first affirmative defense. It could have no reference to the indisputable presumptions flowing from Sec. 2332, which this court held in Belk vs. Meagher, 104 U. S. 279, is the equivalent of a valid location. For Judge Hunt showed the contrary in his concurrence with Judge Ross in holding that compliance with Sec. 2332 would exclude attack.

Petititoners suggest that no instruction was asked by respondent in compliance with Judge Hunt's ruling. So far as it relates to the first class of presumptions, the errors occurred in the main by the trial court's rulings upon the evidence, and in denying our right to full cross-examination of plaintiff's witnesses (Exhibit A, pp. 607-650, Chap. XIII), to which errors were assigned

(Nos. 23-26 on Exhibit A, pp. 722-727), and by our exceptions to the instructions of the court so far as requiring proof of discovery by respondent, instead of proof of non-discovery by petitioners (R., p. 1237). But our exceptions for denial of protection under Sec. 2332 arose not merely upon the refusal of our requests, considered by Judges Ross and Hunt, but also upon our request for a peremptory instruction (Rec., p. 1208, bottom) and upon our assignments challenging lack of evidence to support the judgment, and that the verdict and judgment are against the law. These go to every permissible inference from the evidence, and the evidence as to adverse possession being without conflict, it was a case for a peremptory instruction. If it had been a case of conflicting evidence, requests might be necessary on the assumption that the jury might elect to believe either side; but where there is no conflict of evidence, there is only one legal corrolary, and it is for the court to declare and enforce the same. There is no lack of exceptions and assignments on this phase.

Petitioners say we asked no instruction as to the effect of long continued possession to throw the burden of proof on plaintiffs to overcome. This is largely answered by what we just said. There was no conflict of evidence calling for an instruction or request upon each phase or contention. It was undisputed that respondent and his grantors had had long-continued possession. But this subject relates wholly to the disputable presumptions that may arise on long possession, prior to the running of the statute, Sec. 2332. These were merged by the

conclusive presumptions that solely distinguish the operation of Sec. 2332. And it was unnecessary to instruct as though Sec. 2332 had not run.

Besides they say on page 6 of their petitions for certiorari in this court that they did assume the burden of proof, and made certain proofs, etc., to discharge it. Now they think we should have asked the court to require that they do so. For that matter, the trial court had already erred repeatedly in ruling against exceptions during the testimony, that the burden was on defendant to prove discovery, rather than upon plaintiff to disprove it; and there would be no sense in asking the court to instruct contrary to its own settled rulings. We excepted to the court's general charge where it violated this principle (R., p. 1237), as well as its rulings upon the evidence, which we treat later herein. The jury was thereby fully instructed as to the court's views as to the presumptions and burden of proof long before the evidence closed.

The same is true as to the presumptions arising from recitals in the location certificates, about which petitioners argue. What difference is it whether there is or isn't such a presumption, so long as it is a rebuttable one, as it manifestly is, prior to limitations, and they pretend on page 6 of their certiorari petitions to have met and disproved the presumption? The recital of mineral discovery in a location certificate has been held by many courts (including his honor Judge Gilbert of the dissenting opinion below) to amount to proof of discovery, especially in

case of an old recorded location, often transferred. (See Thomas vs. Min. Co., 211 Fed. 105-7-8; Vogel vs. Warsing, 146 Fed. 949.) But if petitioners met and disproved the presumption as they contend in their petitions, we do not see how they are affected thereby. Any way, how can such a mere rebuttable presumption figure in the consideration of Sec. 2332?

## POSSESSION AND WORKING.

Petitioners urge, and cite the dissenting opinion below to the contention, that there must be more working of a mining claim than is shown in this record—the development of ore bodies and the shipment of ore—to constitute the working of a claim *"in the usual and customary manner in the vicinity thereof,"* within the meaning of the Nevada statute. But where do petitioners get the impression that there must be any particular or specified amount of work done, or any particular amount of development of ore bodies or shipment of ore? The U. S. Rev. Stat., Sec. 2332, itself does not prescribe any definite amount. No other United States statute does, except R. S. Sec. 2324, which requires $100 annually in labor and improvements. More than that was admittedly done on these claims, as we have shown (ante p. 11-12.

The words "usual and customary manner in the vicinity," above, are from the Nevada statute and do not themselves require any particular amount of work on a mining claim, but they refer to the "manner" or method of doing the work, if words mean anything.

Now we do not know that the method or manner of doing work is a subject of very great importance in mining law, or that the law cares whether given work is done by hand-power, horse-power, or electrically and with machinery, so it is done; nor whether it is done rapidly or slowly, if there is a year to do it in. But it is not permitted to the Nevada legislature to add any burdens to the operation of U. S. Rev. Stat., Sec. 2332, either as to the manner or amount of work necessary to perfect a location thereunder, but it is permitted only to fix the time of local limitations. And when the time is thus fixed, it becomes adopted by Sec. 2332 as the period of time required thereby. The local authorities have no other say in the matter than to fix the time. (Reavis vs. Fianza, 215 U. S. 16, so holding with respect to Sec. 45 of the Phillipine mining laws, copied from said Sec. 2332.) And if the insertion of "usual and customary manner" in the Nevada statute could be allowed as adding any clog or burden upon a citizen's full right of reliance on U. S. R. S., Sec. 2332, it would be simply legislating without its jurisdiction. We can all agree on that principle.

Such an attempted specification of some indeterminate *amount of work* or *development* or *shipment of ore* would be an impossible provision in mining, and would be reconcilable to no known standard, as we showed on pp. 16-24 of our brief against rehearing below filed here against the certiorari petitions, to which we refer without unnecessary repetition. And even if a community custom could influence the matter (seeing the Nevada

statute itself does not attempt to do so), still there could be no presumption without proof that any such custom existed in the vicinity of these mining claims, and that respondent and his grantors failed to comply with it. If there is any presumption, it must be that respondent conformed to the custom, since no custom can become a custom without sufficient uniformity of effort or direction by individuals to create the same. Such a custom would be dependent as much upon respondent's manner of working his claims as upon that of any other claim owner to secure establishment as a custom. So how can it be assumed without proof, that respondent alone of the limited number of individuals in the "vicinity" neglected to conform to a custom in the manner of doing his work? Indeed, were the facts known, it might appear that respondent was the only owner of lode mining claims in the Copper Canyon vicinity, and that he owned the entire Copper Canyon group. And that if there were any custom in that vicinity he established it himself.

And as to any definite *amount* of work, if they still contend, no consensus of effort in excess of $100 annual labor could ever be established as a custom. Necessarily such matters vary in exactly the degree that the physical character, location, accessibility, mineral showing, etc., of the different mining claims, and the convenience, financial resources, preoccupation, whims or desires of a community of prospectors and claim owners always vary. No usage of sufficient unanimity to become a custom ever could be shown, because no individual owner, with

determining factors as above, could ever become a type of all others.

And what is meant by "the development of ore" and "shipment of ore" here contended for? Does it mean the exposure of large ore bodies to the eye, and if so, how large an exposure? Must there be ten square feet, or ten thousand, or ten million, of surface exposure of the vein? And how many tons must be taken out and shipped somewhere, to constitute "shipment of ore" and satisfy critics? By what authority can the legislature of Nevada or any court or judge, or a litigant, fix a standard in this respect and decree compliance therewith as a price of protection under U. S. Rev. Stat., Sec. 2332? On the contrary, nothing in excess of $100 annual labor is required to hold and work a mining claim. See cases cited on page 499 of our brief, Exhibit A. The location work is in itself a partial exploitation or development of a mine (Ambergris Min. Co. vs. Day, 85 Pac. 113) and the annual labor is more. The law has not required more than this in way of "holding and working" a claim, though considerably more has been done on these lode locations by respondent's grantors. (See Exhibit A, page 678.)

The three lode claims here are units of a group of about twenty mining claims. There are often 50, 100 or more mining claims in a group. The suggestion here made by petitioners would necessitate commercial ore being found near the surface of every claim in a group, and that every claim undergo development, mining and shipment of ore simultaneously, in some undefined amount,

at an unheard of expense. Take the typical group of mining claims, located end-to-end upon either a single or parallel veins, or crossed, branching and connected veins. A vein is opened on one claim at the most accessible point to the canyon and outlet to transportation, and which will be a key to access to the remaining claims in the group as far as possible, and at a minimum of expense. From that point the vein can often be opened and ore mined and removed to the furthest reaches of the vein, both vertically and laterally through all the claims of the group, as long as the contact can be followed. That is the object of all mining, viz.: to do as little dead work as possible. Engineering questions are constantly arising, to modify a pre-adopted plan. It may take years or generations to reach the utmost confines of a group and fully exploit or "develop" them all. Meantime practically no mining may be done on the outlying claims of the group, aside from the annual labor. The discovery work and annual labor may reveal very promising veins of ore in place on each of them; the veins may be well-defined, easily followed and carry substantial values. But it takes a considerable amount of money to open a mine and prepare for stoping out ore—quite an amount of dead work which for the time is unproductive. No mine owner in his right mind would think he had to duplicate this expense on every claim in his group, and ship ore from all of them at one time.

Yet the suggestion is here seriously made by petitioners, and in the dissenting opinion below, that this enormous expense must be duplicated on every mining

claim in a group of ten or five hundred claims, no matter what natural obstacles and economic objections, so that ore bodies may be exposed and shipment of ore may go forward from all at one time; or else U. S. Sec. 2332 does not apply. The United States treasury itself would not stand the strain of such "mining."

On the undisputed proofs in this record, the Midas lode mining claim has a tunnel 75 feet long on it in solid rock (R., p. 356), exposing a clearly defined vein with a strike and dip and substantial mineralization, extending right out to the surface slide and dirt. (See record citations in brief, Exhibit No. 1, at pp. 499-505.) Other well defined veins are exposed in open cuts or shafts at points 21 and 23 on the Midas (see map), as per record citations to testimony in said Exhibit No. 1 at pp. 491-498. The Evening Star lode claim has veins exposed at open cuts 20 and 24 (map), as cited to the record in Exhibit No. 1, pp. 505-512. One of the veins being a very wide one, so that only one of its walls is exposed in the open cut. The Salt Lake No. 3 has several veins exposed, one said to be about four feet wide. (See testimony cited to record in Exhibit A, at pp. 559-587.) There are several cuts and excavations upon each claim made before the attempted claim-jumping, not to mention the placer shaft 55 feet deep to bed-rock in the canyon, sunk by respondent in the summer of 1913, exposing immensely rich placer gold. Off these three claims but on the Copper Canyon group of which they are part, are several extensive cuts, shafts, tunnels, cross-cuts, up-raises, etc. One of them, the Farren adit, is 1000

This 590 foot Virgin shaft is sunk upon
the vein which dips west on a 60 degree in-
cline (Rec. [illegible]) exposing bodies
of copper ore, one of which has a 15 foot
[illegible] copper. The Superior
ore body is only 300 feet east and also dips
west to unite the [illegible] Index No. 5 (Rec., p.1020).
There no ledges extend on the 60 degree in-
cline which [illegible] it unnecessarily into Salt
Lake No. 2 ground or into immediate contact
[illegible] this tends to the development and
working thereof. By dispensing with the dead
work [illegible] from the surface. In the
[illegible] there is no copper ore exposed
[illegible] and 1051). This Adit was
also for the benefit of all the claims in
the group (Rec., pp. 722-725; 840-858). In
addition there was the mill road from the
canyon to the mouth of the adit to the mill,
which took several months to build, and was
all blasting and exposed a number of veins.
Likewise, the mill foundation exposing a vein
(see photo of this, brief page 124). And
see Rec., pp.861-2. The ordinary mill and
[illegible] were built in 1912 and 1913 (Rec., pp.
860-2 and see Ex. A, pp.181-181).

This 1913 work cost over $26,000 besid-
ing in the new mills and the 1915 work over
14,000, so that over $40,000 of expenditures
r labor alone. Without material and supplies
r the years 1912-1913 stood in the way of
y relocation of the ground in September,
913, And since for some unsure working of the
laims. [illegible] and date of this work is
l in the record. The cost of it was ob-
ected out by petitioners, but error is as-
gned thereon. We [illegible] petitioners can not
ve the benefit of a contention against the
et and also exclude evidence to prove the
et -

(See generally evidence cited to the
ecord in brief Exhibit A. at pages 161-182).

(See generally evidence cited to the
record in brief Exhibit A. at pages 181-188).

Petitioners expert witness Boyle testified to cross-vein in one of the mill benches on the Salt ake No.3 (Rec.p.401), which is perhaps the same s that pictured in the photo infra page 124, as eing in the mill bench. Being a cross-vein it trikes east into the main virgin mine workings 00 or 300 feet east. (Map,ante, and photo Ex.No.3 t pp.76-77 infra). Hence all the deep workings here develope the Salt Lake No.3 by permitting a rift upon the cross-vein into the latter, without he dead work of opening the latter separately. hich vein shall be worked first, or which has een worked, is and was for the management to ecide.

This 300 foot Virgin shaft is sunk upon
the vein which dips west on a 60 degree in-

feet long with several hundred feet of cross-cuts and workings therefrom, its portal being only 200 or 300 feet from the Salt Lake No. 3 (R., pp. 679-949). Another, the Virgin shaft, is 590 feet deep, dipping toward the Salt Lake No. 3, with large ore bodies exposed in it (R., p. 947). And there is another tunnel, the Eagle tunnel, 300 feet long (R., pp. 772-3). A vast amount of valuable ore has been shipped from this group. How much more has the court a right to say must be done upon any one claim than has been shown in this record?

Petitioners, in their brief, do not say that these mineral bodies had not been discovered, opened and exposed, on and off the Salt Lake No. 3, Midas and Evening Star, but they say the ore bodies had not been developed (their p. 20.). If they mean by "developed" that we and our predecessors had not regularly shipped ore to smelter from these three claims, perhaps that is true, but that does not forfeit title to them. We were shipping from an adjoining claim, and if they will kindly forbear, we will ship the placer gold too from the canyon bottom. Meantime the validity of a mining claim in no manner depends upon the extraction of ore therefrom.

> Kirk vs. Meldrum (Colo.), 65 Pac. 633;
> Mining Co. vs. Min. Co., 143 U. S. 396.

And work done for discovering mineral, in whatever form of deposit, whether lode or placer, is work and improvement within the meaning of the statute.

> Walton vs. Min. Co., 123 Fed. 209, 217-8;
> And cases cited in Exhibit A, pp. 498-9.

At any rate the shipment of ore is not shown to be necessary to the operation of U. S. Rev. Stat., Sec. 2332, and it has never yet been so held.

They say that "not a single shaft has been sunk upon a vein." They do not say that shafts have not been in fact sunk in solid rock in place, and their assertion that it has not been sunk upon a vein is simply based on their contention that there must be commercial ore at the surface or they will not call it a vein—but will call it by some other name. We deal with that suggestion subsequently (infra p. 88-90), but for the present it is sufficient to remark that the statute, Sec. 2332, does not require any shafts to be sunk upon the veins. Possession and working is all the statute specifies. The isolated fragments of testimony cited on their page 20 gives no intelligible idea of what the record contains as to the veins and lodes opened on these three claims. It amounts only to the same contention already treated, viz.: that ore has never been mined and shipped to smelter therefrom, albeit large amounts of ore have been shipped from an adjoining claim. There is no basis therein for an assertion that the ground has not been held and worked as required by Section 2332.

They urge Judge Gilbert's dissenting opinion below, but his honor erred grievously in arguing that if the Nevada statute be ignored (in its specification of "usual manner," etc.), the court would be committed to the proposition that a mining claim may be acquired as against all but the United States without making a mineral discovery. No such consequences could possibly

follow ignoring such unauthorized application of the Nevada statute—nor yet from obeying the behest of R. S., Sec. 2332, as to what the proof of a valid location may consist of. A mining location so perfected and validated is none the less a "mining claim" (including discovery) than if the proof had consisted solely of the exposure of the vein without adverse holding. And the consequences of upholding the statute will be nothing more serious than to deny to certain jumpers (or certain gentlemen who cannot even connect with the claims of the jumpers) the privilege of laying hands upon more than $100,000 worth of valuable gold deposits which respondent had discovered and uncovered upon his own property before petitioners or the jumpers ever heard of it.

On pp. 116-17 of petitioners' brief, they attempt to analyze the Nevada statute (Sec. 4951), but as shown above, Nev. 4951 has nothing to do with it but fix the time, which is all that is allotted to a local legislature under U. S. R. S. 2332. They say that defendant and his grantors maintained a "casual" possession of the lode claims for sixteen years from 1897. We do not know what they mean by casual, in view of the record citations to testimony, on pages 102-105, 162-182, 187-192, 232-236, 431-443, 450, 465, 541-591 of our brief, Exhibit A. Valuable buildings, mill, roadway, tunnel, shafts, workings, watchman always on the ground and residing in one of the houses, keeping the boundary stakes up and in place, and all annual labor performed, with at times two to twenty men at work.

They cite one record page to the suggestion that we located buildings with the ground in 1897. But this refers t otwo or three old cabins of miners. All the substantial buildings were constructed in 1913 and paid for by respondent. (See testimony cited in Exhibit A, at pp. 173, 177, 181.)

## ADVERSE HOLDING.

On page 18-90 petitioners contend that respondent and his grantors' possession and working of the lode claims could not have been adverse to petitioners prior to the attempted relocations in September, 1913, because the latter were not then claiming anything; and they seek to distinguish in this respect the case of 420 Min. Co. vs. Min. Co., 7 Nev. 420, cited in support by the Court of Appeals. It is true that that case is upon its facts like those supposed in Belk vs. Meagher, 104 U. S. 279, in that there was an ouster and subsequent adverse holding by a jumper against the original locator and occupant, rather than like the facts in Reavis vs. Fianza, 215 U. S. 16, Mining Co. vs. Willis, 127 U. S. 471, where adverse possession and title under Sec. 2332 ripened before there was a jumper. But that circumstance in no manner makes the first class of cases exclusive in scope or a monopoly of the statute. The United States Supreme Court applied the statute in both class of cases, and all other courts have followed. In the following cases the statute was applied against the jumper, and the adverse holding occurred before he arrived, contrary to petitioners' contention, viz.:

Reavis vs. Fianza, 215 U. S. 16;
Mining Co. vs. Willis, 127 U. S. 471;
Bismark Min. Co. vs. Min. Co., 95 Pac. (Ida.) 14;
Mining Co. vs. Murphy (Nev.), 109 Pac. 851-6;
Buffalo, etc. vs. Crump, 69 S. W. (Ark.), 576;
Harris vs. Min. Co., 8 Fed. 863;
Golden vs. Murphy (Nev.), 103 Pac. 395-6;
Upton vs. Min. Co., 89 Pac. 275;
Vogel vs. Warsing, 146 Fed. 949;
Rich vs. Wiseman, 59 Pac. 1111;
Gropper vs. King, 1 Pac. 755-6.

It has never been held that the statute, Sec. 2332, is the exclusive property of a jumper, or desperado who succeeds in throwing the lawful owner and occupant from his claim.

On page 16 petitioners go a step further and cite McTarnahan vs. Pike, 27 Pac. 784, to the contention that Sec. 2332 does not operate even in favor of a jumper until after the U. S. patent. The very miscellany and inconsistency of these different contentions makes us wonder. No such ruling occurred in the McTarnahan case. But the party protected by the statute in that case, and having a valid mining location in consequence, allowed another party to make a conflicting junior location on his ground and carry it through to patent in the land office without filing an adverse and bringing suit to support it, and thereby became barred under U. S. Rev. Stat., Sec. 2325-6. And it was held that a new period of possession and limitations must run in favor of the occupant as against the patentee. Every one knows that publication of notice of an adverse claim

in the land office is in the nature of a summons, and if default be made, all claims will be cut off, both valid and invalid.

People vs. Dist. Court, 19 Colo. 347;
Wolfley vs. Lebanan Co., 4 Colo. 112.
Min. Co. vs. Min. Co., 138 Pac. 71-73;
Min. Co. vs. Tunnel Co., 196 U. S. 337, 353-5;
Lawson vs. U. S. M. Co., 207 U. S. 1-15.

All that respondent claims for U. S. R. S., Sec. 2332, is that compliance therewith is the *equivalent of a valid location* under U. S. R. S. 2319-2320, as held in Belk vs. Meagher, 104 U. S. 279. But a location valid under U. S. R. S., Secs. 2319-2320, would lapse and be defeated by failure of the owner and locator to file his adverse and begin suit in support of it against an applicant for patent under a junior location of the same ground. Equally so would its equivalent under Sec. 2332 be defeated thereby. For the latter has only the rights of a valid locator; no more, no less. But under U. S. R. S., Secs. 2325-2326, the rights of every and all claimants and locators, valid or invalid, are barred and defeated by a failure to adverse and bring suit. If, for failure to do so, the junior locator gets a patent, then manifestly a new period of adverse possession must begin and run its course in order to defeat the new title. For a patent cuts out everything—all rights or claims initiated prior thereto.

Now the petitioners here have obtained no U. S. patent to the mining ground involved, and hence are

in no position to cite McTarnahan vs. Pike. In the absence of such patent, the Nevada Supreme Court never had any idea of deciding that U. S. R. S. 2332 would not operate in favor of a mining locator or claimant. For both before and after the McTarnahan case, it was deciding the cases in 7 Nev. 240; and 103 Pac. 395, 109 Pac. 851-6, supra.

In aid of the McTarnahan case petitioners have at times also cited S. E. Min. Co. vs. Tinney, 38 Pac. 400, and Tyhee C. M. Co. vs. Langstedt, 136 Fed. 124, which are upon similar facts. The Tinney case cites in support, among other cases, Redfield vs. Parks, 132 U. S. 239, 10 Sup. Ct. 83, but these cited cases did not even involve mining property and U. S. R. S. 2332 at all. Both before and after the Redfield case, the U. S. Sup. Court was deciding Belk vs. Meagher, Min. Co. vs. Willis, and Reavis vs. Fianza, supra. Thus showing that the U. S. Supreme Court and Nevada Supreme Court are able to distinguish between the two classes of cases, even if petitioners are not.

On pages 17-18 they cite a number of cases to the contention that possession to be adverse must be against the true owner, which is part of the same contention just disposed of. For, they argue, that as there was not any true owner when respondent and his grantors began or continued to hold and work the ground, for more than two years, it could not therefore be adverse. But all the cases cited and quoted from were cases under state statutes not involving mining ground at all, nor property within the operation of U. S. Rev. Stat.,

Sec. 2332. Title had passed out of the government into private owners for generations. Congress never attempted to deal with that class of property, nor to authorize a mining location upon ground in a deeded ranch or city property of a citizen. But the U. S. Supreme Court has settled it that said Sec. 2332 applies to unpatented mining claims, as by its very terms it must.

Their citation of McDonald vs. Fox, 20 Nev. 364-8, 22 Pac. 234, is the same. Private deeded lands were involved, not mining claims.

## DISCOVERY AS AN ELEMENT.

We now consider their main contention. They criticise the opinions below and say they recognize the necessity of a discovery. So they do, and so does the statute (U. S. Sec. 2320) and the law in general. Sec. 2320 was enacted May 10, 1872, and Sec. 2332 on July 9, 1870. The latter was not repealed by the former, but this court has applied each section in its proper sphere, concurrently. Under Sec. 2320 mineral discovery may be proved or disproved, while under Sec. 2332 it is presumed. We must stress the point here, in passing, that this is confessedly lode mineral ground, and contains valuable mineral-bearing lodes and veins. No issue was made on that point at the trial, and petitioners sought only to litigate the question whether and when the respondent himself had discovered or come to know of the veins. And without anticipating the discussion of that question here (see post, pp. ....), we will mention that the validity of a mining claim in respect of

discovery depends, in limine, on what the original locator saw or discovered, not upon what a purchaser or remote grantee discovered. The latter is entitled to purchase without any personal knowledge of the veins. And when respondent, a recent comer in 1913, sought in defense of his title to prove by competent evidence at the trial certain large and valuable veins at and immediately under the surface, which could have been and probably were known to the locators and former owners, the evidence was excluded on petitioners' objection, as immaterial. A party cannot have the benefit of a contention on a question of fact, and also exclude evidence to prove that fact. Hence we say the ground is confessedly lode mineral in character; and that the presumption of discovery which the law attaches to certain proven facts, and which becomes conclusive under U. S. Rev. Stat., Sec. 2332, is peculiarly applicable to the case at bar. We will not deviate at this point to discuss the testimony and rulings on which the verdicts rest, for we hold it to have been a misdirected inquiry. We do so later (post p[illegible]). For the present we insist, that had the statute been applied, a 1200-page record could have been properly obviated by a very few pages directed to the real questions under the law and the pleadings.

Recurring to the force and effect of Sec. 2332, petitioners misrepresent our position on this point by saying that it is respondent's contention that proof of two years' possession and working dispenses with all requirements of the United States statute and takes the place of discovery and location. But we say that proof

of compliance with Sec. 2332 constitutes proof of due legal compliance in every respect, including discovery, and is as this court held in Belk vs. Meagher, 104 U. S. 279, "the equivalent of a valid location." This is so because congress has so ordained. Possession of a mineral patent is conclusive proof or adjudication of the fact of prior mineral discovery, as this court has held in Creed, etc., Co. vs. Uintah, etc., Co., 196 U. S. 342-3, 49 L. Ed. 506. This also is true because congress has so ordained. In each case proof of one fact makes it compulsory for the courts to assume or presume the further prior fact of mineral discovery. In neither case can the allegation of no prior discovery be raised to defeat the conclusive presumption? Sec. 2332 enacts that compliance with its terms shall *"establish the right to a patent"*; i. e., the right to a conclusive adjudication that discovery has occurred and that the status of immunity from further contention has arisen. In Reavis vs. Fianza, 215 U. S. 16, this court held that the right to a thing that gives title, is a right to the thing itself.

Possession of a mineral patent is conclusive proof of prior discovery. Why therefore is not a statutory right to receive a patent, the same as a statutory right to be exempt from dispute as to discovery, which a patent gives?

The same power which enacts the necessity for a mineral discovery is competent to ordain what shall constitute a discovery, or sufficient evidence of a discovery.

Again Secs. 2325-2326, U. S. R. S., impose a time bar to litigation of sixty days to file an adverse claim

in the land office, and thirty days thereafter to begin suit. Yet no one will contend that an adverse claimant may still litigate mineral discovery after those days have passed. Still R. S., Sec. 2320, continues in force and operative to require a discovery.

These considerations do away with the suggestion sometimes made in this case that Sec. 2332 applies only to mining claims, and without a discovery there is no mining claim. For how do we know there has been no discovery in any given case? Certainly not by the bare assertion in a brief. And if the issue is tendered in court, the party desiring to dispute discovery is confronted at once by Secs. 2325, 2326 and 2332 each in turn. If he has adversed and brought suit in time, he is still confronted by a presumption of mineral discovery in all cases of long continued possession, recorded location and repeated transfers. But after limitations and Sec. 2332 have run, he may no longer litigate the issue, or dispute the presumption.

They say the jury have been permitted to find the contrary. But that is the very mistake we complained about and secured a reversal upon. A verdict procured by and saturated with error cannot be used to justify its own existence and from its false pedestal overthrow a federal statute. Had the law been observed there would have been no such verdict.

By analogy, a plaintiff suing upon a barred promissory note to which the statute is pleaded, may obtain a special verdict of non-payment, and therefrom argue that *"there is no room for a presumption of payment"*

when the jury have found otherwise. And thus the statute would never get enforced.

If possession and working under Sec. 2332 is the equivalent of a valid location, as this court held in Belk vs. Meagher, then mineral discovery cannot be deducted from this legal equivalence, for it would then not be a valid location, but no location at all.

The petitioners' contention rests necessarily upon the assumption that mineral discovery as an element in a valid location is a perpetual bone of contention which like a demurrer searches the record, but which unlike a demurrer or a woman can never be quieted or shut up. That it is of so fundamental a nature that a bare suggestion of lack of discovery can throw in doubt the most ancient of titles, no matter how long and implicitly relied upon, nor how often sold and conveyed; and no matter what vast sums have been expended upon them. It involves the assumption that not even a federal statute can quiet this litigious subject of inquiry. Not even the sovereign power of the Federal government is competent to abolish turmoil and allow a purchaser to depend upon his titles.

This discloses the essential vice of the contention by petitioners and in the dissenting opinion below, that if the statute be upheld and applied in the face of an inquiry undertaken in violation of its terms, that it will enable a claimant to obtain title to non-mineral lands under Sec. 2332 as a mining claim. Such a contention involves an obstinate assertion of a supposed fact at variance with the conclusion the statute authorizes and

enjoins the court to draw, viz.: that mineral discovery and all legal requirements have in fact occurred. (Harris vs. Min. Co., 8 Fed. 863.) It flavors of the insubordination of a defeated litigant who arraigns the court and the law as wicked and unjust because the decision varies from his own preconceived and persistent contention as to the facts, the law, and the right of the matter.

Certainly there is no basis in this record for the contention that the ground involved is non-mineral. Petitioners themselves assert the placer deposits (results of the weathering and attrition from the lodes and veins in the slopes above), and which they are trying to take from respondent. And petitioners secured the trial court to rule that the existence of lodes and veins was not in issue, and it was immaterial if lodes worth a thousand dollars a ton were there, unless defendant could show he knew of or discovered them before the attempted relocations. (Rec. p. 511, and see brief, Exhibit A, pp. 555-584 and post p. 102.) It was seemingly considered immaterial also, what the original locators had discovered, upon which the validity of the locations manifestly depended. But one thing was very certain and that was nothing should come in evidence tending to show the existence of a vein or mineral character of the ground except respondent could prove by the witness his own prior knowledge thereof. (See post p. 101-116)

This was plain error under Mining Co. vs. Min. Co., 15 Nev. 383. Still it shows the line of inquiry, and how upon petitioners' determined insistence and objections evidence was excluded wholesale, showing the

existence of valuable lodes and veins and the general mineral character of the ground. Only the shallow surface covering of loose dirt and slide to obscure the veins, and in some instances in the old cuts and excavations, it was only a matter of inches, where surface material had eroded or fallen in. This wrongful exclusion is now condemned also by petitioners' own brief upon certiorari (page 28), and in their trial brief in this court (page 32), wherein they say:

> "Proof of the existence of a vein or lode, mine or deposit, may be of such character as of itself to establish the fact of discovery thereof by the original locator."

And also:

> "It will be appreciated that so long as the *existence* of a vein or lode is established the federal statute is satisfied."

They couple with the last above admission the statement that "and the jury were so instructed." The jury were not so instructed, but on the contrary the court ruled repeatedly in their presence during the evidence that it didn't make any difference whether a lode or vein existed or not, nor how valuable. That respondent must show that he discovered it—thus ignoring the presumptions as to prior discovery thereof by the locators, made conclusive after two years under Sec. 2332.

This makes their citation of Brophy vs. Hare, 34 L. D. 596, and Purtlee vs. Steffee, 31 L. D. 400, inapplicable. For in those cases not only was adverse

possession and U. S. R. S. 2332 not an element, but there was a distinct issue fully litigated on both sides as to the existence of veins and general mineral character of the ground, and no exclusion of evidence. Thus in Brophy vs. Hare:

> "In determining whether the claim here was a valid mining claim or possession, the question of the character of the land raised by the proceeding is a primary one. If the applicant had ample time and opportunity to show by exploration and development *whether mineral deposits exist in the land*, and has not done so, and has not in any manner established *that the location embraces mineral land* under the well settled rules of determination *in cases where the character of the land is directly in issue*, his location cannot be held to be a valid mining claim or possession within the meaning of the law. Purtlee vs. Steffee, 31 L. D. 400-2."
>
> Id. 34 L. D. 596-8.

And it was further held on page 599 (34 L. D.) that "the evidence fails to show that the land contains mineral in such quantity and of such value as to justify expenditures for its extraction, or that further expenditures would disclose the presence of valuable deposits of mineral."

In the cases at bar there is no parallel to the above facts and their citation is inappropos.

None of the decisions cited on petitioners' pp. 11-14 involved the question of adverse possession and working under Sec. 2332, and so are not in point. On the primary proposition that a discovery is necessary in a mining

claim, no citation is necessary. It is only with the proofs and presumptoins of the fact that we have to deal.

And so far as protecting a speculator is concerned, there should be no difficulty in deciding where the attempt at speculation is in these cases—whether it is with defendant and his grantors who paid more than $60,000 for the ground in good money, and thereafter spent more than $100,000 for labor alone in getting out mineral from this group of mines from a shaft the portal of which is only about 200 feet from the Salt Lake No. 3 side line; and who in the summer of 1913 sunk at great expense a 55-foot shaft to bed rock in the canyon and uncovered these immensely rich placer gold deposits there; or whether it is with petitioners or their jumpers who never heard of the ground until news of this latter discovery got abroad, and who have never expended a penny upon it except in illegally taking out this placer gold while the injunctions were being prepared.

This placer gold and the loose dirt, gravel and slide material with and above it, which constitute the floor of the canyon, is eroded material from the mountain slopes above it, and from the outcropping lodes and veins therein. This is an undisputed scientific fact, duly proved in the record (p. 938), as unerring as that fallen fruit points to the parent stem above. The only reason the lodes and veins coursing through the mountains on the surface are not visible at a glance, is that the slopes are covered with the shallow mantle of eroded and disintegrated material, which gathers

to a greater depth at the canyon bottom where there is a natural container for it. The process of erosion and accumulation has been going on for untold ages, and the gold being heavier gathers at the bottom at bed rock. The shaft, 55 feet deep, with its sizable dump of fresh dirt ,and rich placer find, were notorious in the community and ocular evidence to the jumpers of what had taken place when they arrived. And so this court observed upon similar facts in Iron S. M. Co. vs. Min. Co., 143 U. S. 403; 36 L. E. 204. (See Exhibit A, p. 237.)

Petitioners say in their brief that they were in possession from September, 1913 (relocations), till August 1, 1914 (respondent's patent applications). This is not supported either by testimony or jury finding. The jumpers were never on the ground (openly) after November, 1913, as they testified (see Exhibit A, pp. 316-7, and Exhibit No. 1, pp. 363-4), or longer than necessary to get the injunctions working; while petitioners themselves (except Healey and Davis) were never on the ground or worked it. They cannot even connect with the semblance of claim made by the jumpers (ante pp. 47.).

But this is one of the minor inaccuracies of the brief.

Petitioners further suggested, that respondent as defendant at the trial, submitted various requests for instructions as to adverse possession, two of which incorporated discovery as an essential element. This is but grasping at straws. If such a request were made it was refused by the trial court, and did not enter into the verdict of the jury nor the judgment that followed.

Hence did not enter into the judgment of reversal here complained of. Granting that one of respondent's trial attorneys framed such a request, in view of the trial court's continued rulings on that point, its refusal by the court was not excepted to or any error assigned. Let them point to a record page. And do they mean to establish the law by pointing to a rejected jury request? If so, they should abide by it rather than dispute it as here. And in the same way we will establish the law by pointing to requests that we still insist upon.

And with respect to their second proposition whether error was committed in refusing requests which omitted mention of discovery, the law on this subject does not depend, as stated, upon the Nevada statute of limitations. As we have seen, Nevada is only permitted to fix the time (215 U. S. 16). There can be no such incidental question as suggested, therefore, of conflict between a State and Federal statute, unless in respect of the words: "usual and customary manner in the vicinity" contained in the Nevada statute. (Ante p. 9...)

Petitioners do not accurately appraise Reavis vs. Fianza, 215 U. S. 16 in saying that discovery was proved. The report of the case does not inform us whether discovery was or not an element of attack, except as it uses the term "mines," and says the working thereof by plaintiff was slight and superficial, yet sufficient under the statute. If the fact of *working a mine* is sufficient evidence of the fact of mineral discovery, as now asserted by petitioners, there is abundant

similar evidence of discovery in this case (see testimony cited in Exhibit A, at pp. 102-105, 161-182, 187-192, 233-236, 431-3, 450, 465, 541-591, and Exhibit No. 1 at pp. 62-65, 114-136, 143-6, 184-7, 379-385, 392, 400, 427-8, 482-513).

Petitioners' contention is operated against by their pp. 8-9 quotation from Belk vs. Meagher, 104 U. S. 279, in that this court expressly held that Belk (a trespasser) had made no entry or other act of location which the law regarded as such, yet that his right and title would ripen under U. S. R. S., Sec. 2332, by keeping himself in and others out, although himself in without right.

In the Belk case, Belk had not remained long enough to get a title under U. S. R. S. Sec. 2332 when the junior locator entered, and broke the continuity of his holding. Petitioners seem to contend that even had he so remained, the junior could throw him out notwithstanding Section 2332. The Belk decision answers this contention.

On page 9 they quote from McCowan vs. McLay (Mont), 40 Pac. 602, but that quotation does not state the construction of Sec. 2332 as ruled by the U. S. Supreme Court. If it holds, as petitioners seem to contend, that in the event of an adverse claim being filed the parties are sent into court without relief from Sec. 2332, it contradicts the three decisions we have cited from this court. Such contention is further impracticable, because until there is an adverse filed in the land office, there can be no adverse suit in the courts. (U. S. R. S., 2325-6.) And without a suit in the courts there could have been no decisions by the U. S.

Supreme Court and other courts upholding Sec. 2332 in the face of an adverse claim, as cited ante p. 15 & 31. Petitioners suggest that this settled construction is the same as striking out the words "in absence of an adverse claim" from Sec. 2332. But as this court held in Reavis vs. Fianza, 215 U. S. 16, there can not be a valid adverse claim in the face of a valid location perfected under Sec. 2332. (See also Snyder on Mines, Sec. 357.)

They cite Humphreys vs. Min. Co., 120 Pac. 823-7, but the language quoted was purely obiter and uncalled for on demurrer. In addition it is against the U. S. Supreme Court holdings and settled construction of Sec. 2332. (Exhibit A, Sec. 158, pp. 148-150.)

They cite Upton vs. Min. Co., 89 Pac. 275-289, but that case is in accord with our understanding of Sec. 2332 and does not assist petitioners.

They seek to distinguish Vogel vs. Warsing, 146 Fed. 949 (cited herein at p. 31.) by saying in that case there was a discovery of mineral. We reply that the evidence was in that case that mineral existed as shown by recent workings (not that it was originally discovered by the locators), and is the same class of evidence that petitioners largely excluded at the trial of the cases at bar, as immaterial, and as an attempt to show a belated discovery. No original discovery was proved in Vogel vs. Warsing, but U. S. R. S. 2332 was applied nevertheless.

They cite U. S. vs. Oil Co., 232 Fed. 619, but it is inapropos, because that was a case between the government and an oil claimant where the United States by

presidential order withdrew the land from entry or location prior to any discovery of oil, and therefore before the grant had attached. No such facts exist here. And while Judge Bean in that case did remark unnecessarily to his decision, that Sec. 2332 is not a statute of limitation (at least as against the government), but is a part of the chapter on mineral and mining resources, and that it *"prescribes the evidence sufficient to establish the right"* of one who has possessed and worked a mining claim, to a patent; yet it is also true that the U. S. Supreme Court and other courts following it have long held that the effect of Sec. 2332 is practically that of a statute of limitations as between citizens. Or if not technically a limitation statute, that it ordains what is practically the same thing, viz.: that the possessor has the *"equivalent of a valid location,"* plus the accrued right to a patent.

Or as Judge Bean puts it in U. S. vs. Oil Co. supra, "it prescribes the evidence sufficient to establish the right." And while it is true, as Judge Bean said, that the statute can have no application to a trespasser on land the title to which he cannot acquire under any law of the United States so as to stand off the government itself, yet those are not the facts at bar and the Oil Co. case is inapplicable.

Petitioners' closing discussion of certain cases, and attempts to distinguish them (their pp. 32-38) may be dismissed with the comment that petitioners do not Court out of those cases under the attempts to distinguish them (their pp. ~~[illegible]~~) may be facts involved adverse possession and U. S. R. S., Sec. 2332,

and which of them did not. In those which did not it is true that evidence could be admitted to overcome the presumptions of validity arising from long continued possession, if conformable to the issues. Otherwise not. At bar, Sec. 2332 and possession thereunder is involved.

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## APPENDIX.

As stated before, the Circuit Court of Appeals was bound to have reversed the trial court judgments because of other vital errors even had it found no error in the rulings in respect of adverse possession and U. S. Rev. Stat., Sec. 2332. Some of these we will now consider in turn. The first one lies at the threshold of the case and controverts their standing as plaintiffs.

### I. PETITIONERS HAVE NO TITLE OR RIGHT OF ACTION.

The petitioners had and have no title to or interest in the pretended Homestake placer location in respect of which suit was begun as against respondent's Midas and Evening Star lode locations (No. 1872 in trial court; C. C. of A. No. 2952, Sup. Ct. No. 568).

In the companion case (trial No. 1873; C. C. A. No. 2953; Sup. Ct. No. 569) only two of the seven petitioners can trace any paper claim to the alleged Guy Davis relocation, resulting in unlawful misjoinder of plaintiffs upon their own showing. (Ex. A, pp. 57-67.) And all of the petitioners being debarred and estopped by the form and recitals of their relocation notice, to question or dispute the entire validity of the prior Salt Lake No. 3 lode location of respondent, and the consequent invalidity of their own relocation of the same ground. They are bound thereby to admit both propositions and their own resulting status as trespassers, having no title.

Their paper title or claim in each case, and the instruments under which they claim as disclosed by their own proofs, is as follows:

IN RECORD No. 568, THE HOMESTAKE

1. Location notice and certificate by John J. Healey and Murray Scott, expressing location of the ground on Sept. 8, 1913 (Rec. pp. 285-287).

2. Deed from John J. Healey to Lillian V. Healey, dated May 4, 1914, recorded May 5, 1914, for grantor's one-half. (Rec. pp. 494-5.)

3. Attachment by Verdi Lumber Co. vs. Murray Scott (Rec. p. 1085); levied on Scott's interest and sold, sheriff's deed following at expiration of redemption (Rec. p. 490) to Frank L. Reber as assignee of certificate of purchase (Rec. p. 1194).

Thus each of the two locators, Murray Scott and J. J. Healey, lost all appearance of interest in the Homestake location. Scott's interest passed to Frank L. Reber by judicial sale and sheriff's deed, while J. J. Healey's interest passed by deed to Lillian V. Healey. Neither Lillian V. Healey nor Frank L. Reber the grantees, ever filed or joined in any adverse in the U. S. Land Office at Elko, Nev., to respondent's patent application for the Midas and Evening Star, and were therefore barred by Secs. 2325-2326, U. S. Rev. Stat. The only adverse on behalf of the Homestake ever filed was by unauthorized persons who had no claim to the Homestake. (See Exhibit M, Rec. pp. 453-462, vide p. 458-459), to

wit, Murray Scott, Frank J. Healey, Geo. B. Thatcher and William Forman.

Of these four adversants, Murray Scott's interest lapsed as shown above. Frank J. Healey never was interested, as J. J. Healey had located with Scott but deeded to Lillian V. Healey. Geo. B. Thatcher and William Forman joined in the adverse but never had an interest or title to sustain it. The only claim they ever had was based on a contract with J. J. Healey and Murray Scott to defend them in contempt proceedings for high-grading gold out of the ground in violation of a Federal Court injunction from Carson City. By this contract (Rec. p. 486) the attorneys, Thatcher and Forman, were to get one-tenth of all gold to be extracted by their clients from the ground. It is labeled "Exhibit X—Deed" in the record, but is not a deed in fact or substance, and contains no word of conveyance. Moreover it was dated Nov. 11, 1913, but not recorded till Sept. 11, 1914, and meantime all right or title of their clients had lapsed and passed out of them by the deeds above mentioned to Lillian V. Healey and Frank L. Reber. The sheriff's deed to the latter was dated January 26, 1915, recorded February 26, 1915 (Rec. pp. 490-3), but took effect by relation to the date of the sheriff's levy on Scott's interest, which was May 2, 1914, recorded May 9, 1914 (Rec. pp. 1085-6), and cut out all prior instruments not of record (24 Cyc. 62). But resort to this rule is unnecessary. The attorneys' contract was not a deed. It contains no word of conveyance, but was a mere employment to render services in litigation, and measured

their compensation by 10 per cent of whatever gold the clients could get hold of. When they lost their asserted titles they lost the right to get gold out of the ground, or to pay their attorneys 10 per cent thereof.

This leaves petitioners Cole, Malley, Ross and Davis to be considered. The first three are political friends of Thatcher and Forman, attorneys, and came in with them perhaps to share expenses of litigation and results, if any. Davis claimed something in the other suit involving the Guy Davis relocation, and it was hoped to make the same parties plaintiffs in each; hence his appearance in this one. By a deed dated May 24, 1915, acknowledged May 25, 1915, Frank L. Reber named above, undertook to convey his one-half interest or claim in the Homestake to these four men, Cole, Malley, Ross and Davis (Rec. pp. 536-8). Take notice that this deed of May 25, 1915, was on the opening day of the trial of these two adverse suits in the Federal Court at Carson City, Nev. (Rec. p. 211), and long after the beginning of the suits in the State courts on September 30, 1914 (Rec. p. 16-21 in No. 568), and long after the adverse in the land office, which was September 24, 1914 (Rec. p. 467). Said Frank L. Reber then had no interest to convey, because his interest had lapsed by failure of himself or his assignor, Verdi Lumber Co., to file or join in any adverse in the land office as shown above (Rec. pp. 453-9, 460-2). And what he then did not have, he could not convey. As the holder of a judicial lien in shape of a sheriff's certificate of purchase (Rec. pp. 1193-5) the Verdi Lumber Co. had on the date of the adverse (September 24,

1914 (Rec. p. 467), the right to file an adverse claim in the land office upon its own account, and should have filed it in obedience to U. S. Rev. Stat., Secs. 2325-2326, if it desired to preserve the same. (See Hamilton vs. Min. Co., 33 Fed. 562-5; Cain vs. Min. Co., 24 Land Dec. 18). Notwithstanding that Murray Scott, the attachment debtor, then also had a right of adverse, in view of his unexpired redemption. But on expiration of redemption Scott's interest lapsed and with it his status as an adversing claimant.

Neither could the sheriff's deed convey to Reber a status as adversing claimant, which his assignor, the Verdi Lumber Co., had neglected to provide for itself. The Lumber Co.'s rights had lapsed by failure to adverse, and even if it were otherwise, it had neglected to begin or join in any suit within thirty days as required by Sec. 2326 U. S. Rev. Reber had not acquired his certificate of purchase until after the time for adversing and beginning suit under Secs. 2325-2326, and so could not become a party nor convey to Cole, Malley, Ross or Davis the right to become party, which neither he himself nor his assignor, the Verdi Lumber Co., possessed.

Notwithstanding all this, the deed from Reber was admitted and his grantees taken aboard as plaintiffs, along with the other plaintiffs (petitioners here) none of whom had any right, title, interest or cause of action respecting the alleged Homestake location. Even had Cole, Malley, Ross or Davis the status of adversing claimants (through Reber and the lumber company), the bringing in of necessary parties after the time prescribed

by statute, Sec. 2326 R. S., for beginning suit is too late and illegal. (Lindley on Mines, Sec. 755, Note 40; Helman vs. Cent. Montana Co., 34 Land Dec. 568.)

Besides all this, the deed from Reber to Cole et al, was admitted over our objections and without necessary U. S. revenue stamps (Rec. pp. 503, 532-3), which was error (Brief Ex. No. 1, pp. 527-9; Sackett vs. McCaffery, 131 Fed. 219), and this was assigned as error (Rec. p. 125 and Brief Ex. No. 1, p. 655).

So that there was no appearance or pretense of any interest in the subject matter, in any of the petitioners (plaintiffs below) upon their own showing.

> "Where the claims of title to a mining claim set up by plaintiffs in an adverse suit appear to be void in their inception, plaintiffs have no standing in court to question the validity of defendant's title."
>
> Omar vs. Soper, 18 Pac. 443.
>
> "Where in a suit in support of an adverse mining location, plaintiff was not entitled to a judgment which he recovered, on the facts existing at the date of the filing of the adverse, defendants are not precluded from objecting to such judgment by the fact that the jury found there had been no discovery by defendants on their claim on which the application for patent was based."
>
> Healey vs. Rupp, 86 Pac. 1015-16.

The respondent (defendant below) and his grantors had been in actual possession, working the ground, at and for many years prior to the arrival and attempted

entry by petitioners and those under whom they claim in this case, as we show later. And it is held that:

> "The plaintiffs not being in possession at the time of defendant's entry, they could not recover except upon a showing of title in themselves without regard to what the defendant had done in the way of exploitation and discovery."
>
> Ferris vs. McNally, 121 Pac. 893.

> "Where plaintiff upon the record has no right or title to the conflicting mining locations in support of which the adverse was filed and the adverse suit begun, he is a stranger to the title to the premises in dispute. A failure to establish title in defendant can in no way benefit him, or validate his alleged title to the conflicting location."
>
> Lavagnino vs. Uhlig, 71 Pac. 1046-9.
>
> And see:
>
> Moffatt vs. Blue River G. E. Co., 80 Pac. 139;
> McMillen vs. Ferrum, 74 Pac. 761;
> Kirk vs. Meldrum, 65 Pac. 633;
> Lalande vs. McDonald, 13 Pac. 347;
> McWilliams vs. Winslow, 82 Pac. 538.

The trial court should have instructed a verdict against the plaintiffs. There is no evidence of petitioners' title to sustain the verdict and our assignment of error thereto should have been sustained.

We will now examine the facts as to plaintiffs' title in the other case at bar.

RECORD No. 569, THE GUY DAVIS MINING CLAIM.

1. Location notice and certificate by Guy Davis and Noah Faubert, on September 6, 1913. (Rec. pp. 236-7, 268.)

2. Deed June 24, 1914, from Faubert to Thatcher for one-half of grantor's (½) interest, which carried a one-fourth interest to the grantee. (Rec. p. 482.)

VanOrman joined as a grantor in this deed, but as he had no interest on the record, his joinder did not modify the effect of the deed.

3. Adverse claim to respondent's patent application for the Salt Lake No. 3 filed in the U. S. Land Office by Thatcher, Davis and Faubert, claiming the ground under the Guy Davis relocation. (Rec. pp. 443-452, vide p. 448).

This brings us to the beginning of suit in No. 569 this court, which was September 30, 1914 (Rec. pp. 15-20), and Thatcher, Davis and Faubert were the only record owners or claimants of the Guy Davis claim at that time, and they only began the suit in the State Court. (Rec. p. 15.) Thereafter on March 20, 1915, Faubert quit-claimed his remaining one-fourth interest to Cole, Malley and Ross (Rec. p. 498), and on May 25, 1915, the day trial opened in the Federal Court at Carson City (Rec. p. 211), Thatcher quit-claimed to J. J. Healey a one-tenth interest. (Rec. pp. 501-2, 535.) These deeds were put in evidence over respondent's objection without the necessary amount of U. S. Int. Rev. stamps (Rec. pp.

501-2, 535-8) and exception was taken and the ruling assigned as error. (Rec. No. 569, p. 125, and see Ex. A., pp. 605-6.) See decision of Ninth Circuit in Sackett vs. McCaffery, 131 Fed. 219.

Had these deeds been rejected (and this court upon the error asigned may do that which the trial court should have done, or reverse and remand for the error committed in admitting them), the record of deeds and conveyances would be complete at this point, and only Thatcher, Davis and Faubert would remain owners or claimants of the Guy Davis relocation. And there is no title or interest in the other petitioners, Cole, Malley, Ross, Healey or Forman. A fatal misjoinder of parties plaintiff resulted by the substitution of parties plaintiff made May 25, 1915, at the opening of the trial (Rec. pp. 211-2). See our brief, Ex. A, pp. 57-63, filed here from the Court of Appeals, where this point is discussed and cases cited.

But there remains an additional written instrument under which the petitioner Forman makes some claim, as also does Thatcher. But the latter being in by the previous Faubert deed, it is immaterial as to him but not as to Forman. It is a contract employing the attorneys to defend the jumpers in contempt proceedings for violating injunctions against trespassing and high-grading, similar to the one above considered in respect of the Homestake (ante p. 51). The attorneys were to get 10 per cent of all net gold extracted from the ground (Rec. p. 473), and it is not a grant or conveyance. But even if otherwise, Forman never adversed or joined

in the suit when filed, and it was too late to take him aboard at the trial. (Lindley on Mines, 3d Ed., Sec. 755, Note 40, p. 1849.) Whether he could come in or not, there would still be misjoinder as above, and we need not consider this contract further.

RELOCATION NOTICE.

Aside from all the above, all the petitioners are out of court on this Guy Davis claim by the form of their relocation notice (Rec. pp. 236-7), under the authorities below. In their notice of relocation Davis and Faubert asserted that they relocated the Salt Lake No. 3 (name of respondent's prior location) on the ground of failure of the owner to *"comply with the requirements of the law."* What theoretical failure of legal compliance they had in mind is immaterial, the important fact being that they "relocated" the ground.

This recital in a location notice of a mining claim is an explicit admission of the validity of the prior location by matter of record, and estops and prevents the party making it and his grantees from disputing or contesting the validity of the prior location, under the rule announced by this court in Belk vs. Meagher, and followed by a long line of authorities in the Federal and State courts in the mining states. These decisions are digested on pages 69 to 80 of our brief in the Court of Appeals, filed here as Exhibit A upon certiorari, to which we refer; but for convenience we cite the cases here:

Belk vs. Meagher, 104 U. S. 279, 26 L. Ed. 735;
Wills vs. Blain, 20 Pac. 798 (N. M.);
Providence G. M. Co. vs. Burke, 57 Pac. 641 (Idaho);
Golden vs. Murphy, 103 Pac. 394-8 (Nev.);
Shattuck vs. Costello, 68 Pac. 529 (Ariz.);
Jupiter Min. Co. vs. Brodie Min. Co., 11 Fed. 666;
Zeres vs. Vanina, 134 Fed. 610-14; 150 Fed. 564;
Lindley on Mines, Sec. 404;
Quigley vs. Gillett, 35 Pac. 1040 (Cal.);
Ware vs. White, 108 S. W. 832 (Ark.);
Cunningham vs. Pirrung, 80 Pac. 329 (Ariz.);
Jackson vs. Prior Hill M. Co., 104 N. W. 207;
Zeigler vs. Dowdy, 114 Pac. 565.

All of the petitioners claiming the Guy Davis location are therefore estopped from disputing the validity of the prior Salt Lake No. 3 lode location, and inasmuch as the annual labor had been admittedly performed and kept up by defendant and his grantors, who were in actual possession by custodian, and valuable improvements (record citations, pp. 102-105 and 161-182 of our brief, Exhibit A filed here from the C. C. of App.); there can be no contention urged by petitioners against the entire validity and continued existence of the Salt Lake No. 3 location at the time of the attempted Guy Davis relocation. Hence the ground was not open or vacant public land, and all the acts of attempted relocation of the Guy Davis claim were mere trespasses and void. (See Ex. A, pp. 214-5, 220-1, 281-9; also pp. 51-97, where the decisions are digested.)

We respectfully insist that it ought not to be necessary for the court to go any further than the foregoing to locate decisive error of the trial court, making the judgment of reversal by the Court of Appeals unavoidable, whether announced to be on that ground or not. The decisions ante p54-55 are apropos, and if plaintiffs had no interest in the subject matter or right of possession, upon their own showing then they could not maintain this action. The verdict and judgment was contrary to the evidence and against the law, which we assigned as error, and also the refusal of the trial court to instruct a verdict for defendant.

## II. THE ISSUES. BURDEN OF AVERMENT AND PROOF. ERRONEOUS RULINGS.

In view of the foregoing it may be unnecessary to pursue the inquiry further. Lack of interest or title in petitioners; estoppel to question the validity of the Salt Lake No. 3; no cause of action; the conclusive bar of U. S. R. S., Sec. 2332. But we wish to show that no injustice was done, and that the Circuit Court of Appeals was bound to have reversed in any event.

### THE ISSUES AND BURDEN OF PROOF.

We must first get a clear understanding of the burden of the issue and proofs. Petitioners as claimants of two junior locations or relocations were claiming the ground against respondent, who was in actual possession of the ground under prior locations of long standing. Custodian present residing upon the ground, all boundary monuments up, recorded locations and repeated transfers or conveyances of record for value; all annual labor confessedly done. (See record citations in Exhibit A, pp. 102-105, 161-182, 232-8, 283-8, 313-5, 488-490 as to the Salt Lake No. 3, and see Exhibit No. 1, pp. 62-65, 114-136, 184-8, 230-3, 261-4, 425-8, as to the Midas and Evening Star. The rich placer values at bed rock in the narrow canyon (pretended discovery whereof is the basis of the relocations), already discovered and exposed by respondent's shaft 55 feet deep, sunk prior thereto at substantial expense. (See Exhibit A, pp. 232-8, and Exhibit No. 1, pp. 184-8, for record citations.) Existence

of lodes and veins sufficient to have supported discovery extending to and near the surface not in dispute (see post pp.....) All the above is absolutely undisputed testimony, part of it by plaintiffs' own witnesses.

We have seen ante p. 12-13 that there is a presumption of validity and due legal compliance in favor of every prima facie mining location (and see cases, Exhibit A, pp. 193-7, 205-212). A prima facie location is denoted by the above indicacia thereof. Indeed actual possession alone implies title to a mining claim, the same as in case of every other class of property.

Campbell vs. Rankin, 99 U. S. 261; 25 L. Ed. 435;
Cases cited ante pp. 13;
Cases cited in Ex. A., pp. 290-306.

Possession which implies title, also implies every evidential fact necessary to title, and in the case of a mining claim this includes the discovery and possession of mineral, without which there can be no title. This presumption is greatly emphasized and strengthened to the point almost of conclusiveness by long continued possession, repeated transfers and conveyances, and substantial improvement or development.

Jantzer vs. Copper Co., 20 Pac. 93;
Cheeseman vs. Shreeve, 40 Fed. 787;
Cheeseman vs. Hart, 43 Fed. 98;
Thomas vs. Mining Co., 211 Fed. 105-7-8;
Harris vs. Min. Co., 8 Fed. 863;
Vogel vs. Warsing, 146 Fed. 950;
Bevis vs. Markland, 130 Fed. 226.

and is rendered absolutley irrebuttable by the running of time under U. S. R. S., Sec. 2332. But prior thereto, the presumption of validity, if and when rebuttable, must be met by a specific allegation and proof of the existence of some recognized statutory ground of invalidity or of legal non-compliance. (Cases supra and Exhibit A, pp. 205-212.) Or as stated in Renshaw vs. Switzer, 13 Pac. 127-128, *"the second locator must allege and prove that the right of the first locator has gone before his own location has any validity."*

> "They must establish that the defendant's location was never made, or if made, that it has been abandoned or forfeited prior to the plaintiff's location."
>
> 2 Alaska, 496.

In Hammer vs. Garfield Min. Co., 6 Mont. 53; 8 Pac. 153, the Supreme Court of Montana ruled that a trial instruction was erroneous insofar as it stated that the original Garfield lode was not questioned in the pleadings, but was otherwise correct. This court held upon error to that court that the instruction in question was correct on both grounds, not only as ruled by the Montana Supreme Court, but also because the validity of the prior location was not sufficiently challenged in the answer.

In Lockhart vs. Farrell, 210 U. S. 148, 28 Sup. Ct. 681, reversing the Supreme Court of Utah in 86 Pac. 1077, it was held the burden is upon a junior locator to allege and prove the ground of invalidity relied on, which in that case was a previous location said to have

been in existence at the time of the senior location, and that it had not been abandoned or forfeited. This was followed in Willison vs. Ringwood, 190 Fed. 549.

In Russell vs. Hoyt, 2 Pac. 95, it was held that proof of invalidity on the ground of no prior mineral discovery in the senior location could not be admitted in the absence of an averment to that effect.

A mining location can only be made by performing certain statutory steps, and it should not be difficult to point out the specific defect or omission relied upon, and which it is proposed to prove. A location will not fall by its own weight the moment an interrogation mark is held up beside it.

There are cases where conflicting locations are both recent, and the priority and rotation of the respective acts of location are in doubt or interlaced in point of time—the possession by either mixed, scrambling or equivocal in character, where the presumptions in favor of either must be very weak or non-existent. In such cases, each claimant practically rests upon proof of his own facts with little of presumptions to aid him. A number of decided cases have involved this condition of affairs, and given rise to judicial expressions wholly inapplicable to cases like these at bar, but which petitioners have at times sought to twist to their advantage here.

But when a location has been many years perfected of record, with boundaries up, *mineral-bearing veins in place*, and has been often transferred and conveyed—the presumption of validity becomes very strong, and

is of the same nature as the presumptions of innocence and of rightfulness and regularity which protect every citizen in his possession of life, liberty and property, until something sufficient to deprive him of these have been alleged and proved against him. He must have his day in court, with notice in advance of the specific charges or averments, that he may prepare his answer or defense.

Petitioners do not now controvert this rule, at least as to the burden of proof, for on page 6 of their petitions for certiorari, in this court, they say that at the trial they assumed the burden and made certain proofs of invalidity, etc. Whether they did so or not we will see later, but the assertion that they did is at least a confession that they should have done so, if they expected to succeed against the prior locations. They say nothing as to their necessity to have also alleged a ground of invalidity in their complaints. The law however supplies the omission, for the allegata and probata must always agree, and either without the other is insufficient.

Their complaints (R., p. 16) contained no averment of any invalidity or legal non-compliance in the prior lode locations, unless it be the invalidity that would result from the pretended prior location of the Homestake and the Davis locations. In par. 2 of their complaint in each case they alleged that plaintiffs are the owners since September, 1913, of the Homestake (and Davis) mining claims by due legal compliance, etc., "and by actual prior possession, location and discovery thereof by these plaintiffs, their grantors and

predecessors in interest." (R., p. 16.) In other words, the Homestake and Davis locations were first, and the ground was no longer public domain when respondent or his grantors located the Salt Lake No. 3, Midas and Evening Star lode claims. Whether sufficiently so alleged or not, this was the only issue offered the defendant. And even this was not by way of discharging the burden of averring a ground of invalidity against prior locations. Because if plaintiffs were in fact first to locate, the burden of attack would be upon defendant and not upon the plaintiffs, for defendant himself would be junior.

At the trial they offered no evidence whatever that the Homestake and the Davis were prior to the Salt Lake No. 3, Midas and Evening Star. But their own evidence showed improvements and pre-occupation by respondent and his grantors under the latter locations when the former were attempted (see record citation in Exhibit A, pp. 236-7-8, 283-6, 313-8; and in Exhibit No. 1, pp. 185-7, 230-5, 261-3), and to their knowledge. And their location notice of the Davis claim recited that it was a relocation of the Salt Lake No. 3 (R. p. 236, and see ante pp. 5-8.). And see chronology of the respective locations as stated on page 1 of their petitions for certiorari in this court.

As the issue tendered was not sustained nor, in view of the above, intended to be sustained at the trial, their complaints stood for present purposes, without any issue or averment whatever of any ground of invalidity or legal non-compliance in fact by the locators of the Salt Lake No. 3, Midas and Evening Star.

It follows therefore that respondent's objections to any evidence of the making of the junior locations or relocations until it was first shown that the ground was at the time vacant, unoccupied and unappropriated public land of the United States (R., p. 227), should have been sustained. (Assignments Nos. 2, 3, 4, 5, 6 and 7 in record No. 568, and Nos. 2, 3, 4, 5 and 6 in No. 569, R., pp. 113-7.) Also our objections to evidence of their relocations because they are estopped to dispute the validity of the claims relocated (R. p. 235-6; and assignments Nos. 6 and 7 in record 568, and No. 7 in 569, R., p. 117).

Also respondent's motion to strike out the plaintiffs' testimony on the subject of mineral discovery in the prior lode locations (R., pp. 526, 533) should have been sustained, and its refusal by the trial court was assigned as error (Rec., 568, pp. 130-1; Rec. 569, p. 137).

Non-suit also should have allowed (R., pp. 527-9, 531-2-3, and cases cited in Exhibit A, pp. 593-602, and

Moffatt vs. Blue R. G. E. Co., 33 Colo. 148; 80 Pac. 139;
McMillen vs. Ferrum M. Co., 74 Pac. 461;
Kirk vs. Meldrum, 65 Pac. 633;
McWilliams vs. Winslow, 82 Pac. 538;
Lalande vs. McDonald, 13 Pac. 347.

And our exceptions and assignments of error to the insufficiency and absence of evidence to support the verdicts and judgments, and the latter against law, should

have been sustained (R. 568, pp. 144-153; R. 569, pp. 139-149).

The Circuit Court of Appeals could have reversed the trial judgments on these grounds.

III. No Evidence Disproving Prior Mineral Discovery in the Senior Locations.

## III. NO EVIDENCE DISPROVING PRIOR MINERAL DISCOVERY IN THE SENIOR LOCATIONS.

However, considering the case as though the foregoing objections did not exist, petitioners made no proof of their contention that no mineral discoveries had been made in the prior locations before the attempted relocations in September, 1913. Their omission to allege this could not relieve them of the duty of proving it, if they would impeach the locations on that ground, though it could have prevented any testimony on the subject if the law had been enforced. Neither did they prove that the ground is not lode mineral in character, with lodes and veins coming up to and near the surface. In fact they never intended to be understood as controverting by their evidence that such lodes and veins do exist, as we show herein. On the contrary, their own evidence showed some evidence of the veins, and with testimony for respondent in harmony therewith established them beyond question.

The contention on which they insist is that these veins were not discovered by or known to the respondent prior to the relocations in September, 1913. But their testimony does not even tend to establish this contention. It was directed to neither time, place or circumstance, nor mineral exposures or indications, upon which the prior locations purported to be based. They professed no knowledge or information upon that subject. But their testimony was limited to their own observations on the ground, admittedly superficial and incomplete, made many years after the respondent's locations had

been made, and after fabulously rich placer gold deposits on the ground (discovered and exposed by respondent) had attracted them to the locality. How these recent observations could have based any logical inference as to what the original locators and owners had or had not seen or observed, seeing they do not controvert the existence of the veins there to be seen, is beyond our capacity to determine. Yet discovery and knowledge, as distinct from vein existence, is what they contest, and there is not a line of evidence to support it.

We will first consider their testimony as to their observation of surface conditions generally, then as localized to certain cuts and openings on the ground, and thereafter the whole as limited and restricted by their own declarations and procured trial rulings.

IN GENERAL.

All of their general and unlocalized testimony is set out and abstracted to the record with page citations in Sec. 494 (p. 511) of our Exhibit A (being the same as in Sec. 450 of Exhibit No. 1). All general testimony pertaining to the Salt Lake No. 3 alone is contained in Sec. 495 (p. 521) of Exhibit A. While all their general testimony pertaining to the Midas and Evening Star locations is contained in Sec. 451 (p. 458) of Exhibit No. 1. At the end of each section is given a reference to the section containing related testimony for respondent. But at present we will consider petitioners' testimony alone. Some of it evidently has reference to certain cuts and openings, but what openings does not appear, so

as to localize the same in the abstract. It may all be boiled down into a few brief propositions, viz.:

1. Their witnesses "went over the ground" and did not see any lodes or veins, or what in their judgment or experience they would consider to be such.

2. The ground is covered with a mulch or mantle of loose dirt, rock, gravel or slide, with here and there a rock cropping, and certain cuts and openings in the surface, showing crevices or seams.

3. Healey prospected and panned in each of these but "got no color in hard rock." Used a pestle or mortar. But if evidence were produced showing assays of $7 or $8 from any of those workings, it would not change his opinion. Didn't clean out any of those workings to see if they were in mineral at the bottom. Looked very old and cuts well covered in.

4. Miners disagree on what is worth locating; one will locate what another wont. They do not always see the same thing or conditions, and if they do they are apt to disagree as to its merits. That is the history of all mining claims.

5. Boyle never saw the ground except during two days in November, 1913. Took some samples and assays. Yes, saw what geologists would term veins; there were deposits there which geologists might term a vein. Distinguishes between methods of vein formation or deposition, as by molten matter, or by gases and vapors. Did not discover what witness would as a mining man and engineer consider a lode or vein as a commercial proposition. Mineralizing waters may have flowed in the crevices and deposited mineral. Saw a splendid lode on

the Washington claim (one of the same group) only 500 or 600 feet away from the Davis claim (or Salt Lake No. 3).

6. Prevailing country rock formation believed to be Weber quartzite, but is not sure of it, and very difficult to determine. If so it has nothing whatever to do with the value of the claims. The quartzite of both the Battle Mountain and Shoshone ranges are believed by witness to be quartzite but contain valuable mineral deposits. Fractures or fissures may dip in any direction.

7. Moran demands rich ore to start with, or no veins.

As much as we dislike to defer consideration on the merits (?), we must pause to mention that such testimony has no legal quality as evidence of no prior mineral discovery. As long ago as Cheeseman vs. Hart, 43 Fed. 98, it was held that parties cannot be sent upon an old mining claim years later to skirmish around and by a failure to see or discover lodes and veins, equip themselves as witnesses against its original validity. And in Clark-Montana Realty Co. vs. Ferguson, 218 Fed. 959 (digested at pp. 503-4 of Exhibit A) substantially similar testimony was held to be mischievious and misleading in trials before a jury. That there might be circumstances under which such testimony might be conditionally admitted in a *trial to the court*, yet in a jury trial it would tend to obscure the real issue, to deceive, to do injustice (218 Fed. 964). One of the conditions under which such testimony might be admitted *in a*

*trial to the court* was said to be "where a placer patentee asserts no lode existed then to rebut such assertion."

In the cases at bar the trial was not to the court, and no such conditions existed for the admission of such testimony.

Petitioners cite us to Mining Company vs. Corcoran, 15 Nev. 157, in opposition to these decisions. But that case comes within the exception mentioned, viz.: that it was a trial to the court, and not a jury, in a condemnation suit by one mine owner against another. It is not clear from the opinion whether the testimony there admitted was the same as that here objected to. But anyhow it was never haerd of that plaintiff in eminent domain may dispute his defendant's title, since he must admit that and appraise and pay for it, as a basis for his judgment in condemnation. Mining is the paramount industry in Nevada and a public use under their statutes. It seems from the opinion in that case that plaintiff was going to spend a large amount of money in its mining program which would boost the state, and the court was much disinclined to stand in the way. But it was perplexed by the fact that defendant as a mining claimant had a "public use" equal in point of law to that of the plaintiff, though not so much money to spend. A short cut via "no discovery" was the knife that cut the legal tangle and threw the defendant out of the way. But that was a court case and there is little comfort from it to petitioners in a jury trial like these at bar.

In addition the existence of veins was the
[illegible] investigated in that case, and there was
[illegible] evidence excluded that was offered by the
[illegible]ant to prove such existence, as here. At
[illegible] existence of veins was held not in issue

Independent of that, the evidence is irrelevant under the rule in Lindley (3d Ed.), Sec. 336, note 47, supported by many decisions, and by the very necessities of the case, that the validity of a mining location in respect of mineral discovery, depends upon the mineral conditions and indications that were within the observation of the locator and which induced him to locate the ground. It is either valid or invalid at that time, and if valid then cannot be rendered invalid by the failure of some other prospector years afterward to make a like discovery, or to see the same mineralized conditions. The surface does not always remain the same. Old openings are abandoned and fill up, new ones opened or extended. Drainage from the slopes and surface slide and debris accumulate and tend to fill such surface excavations as may be neglected for a time.

The testimony by petitioners' witnesses as to their "going over the ground" and seeing no lodes or veins, had reference to September, 1913, and thereafter, when they were preparing to contest with respondent his rich placer gold deposits but lately opened up by him. Some of them even called after the conflicting locations were made, in order to help sustain the same by equipping themselves to testify against the older lode claims. But they themselves admit and testify (Ex. A, pp. 380-1, and Ex. No. 1, pp. 325-6) that two miners going upon ground at different times will seldom see the same things, or reach the same conclusions, and often will not agree in conclusion if they see the same thing. The determining factors are embodied largely in a miner's experience and

knowledge as well as the physical factors, yet a tenderfoot is entitled to use his judgment and locate a mining claim. (See McShane vs. Kenkle, 44 Pac. 979.) At any rate the reasonablenes and prudence of a locator in locating ground ten or twenty years ago cannot be appraised by another who goes and looks at the ground today, without he at least sees and observes the same things or conditions that the locator saw and based his decision to locate.

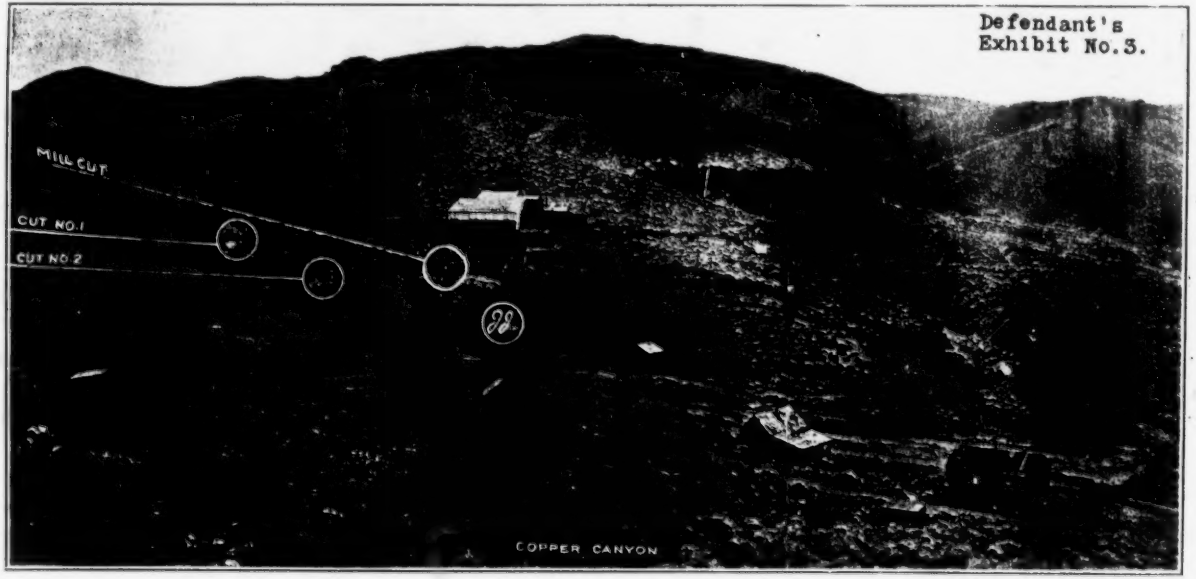
As their witness Phillips testified: "The last fellow doesn't always see what the first fellow saw." And "One may see what the other man don't, and two men may see the same thing and disagree as to its merits." (Exhibit A, pp. 380-1.) Certainly therefore if a valid discovery was made on the Salt Lake No. 3 on its purported date, February 2, 1897, the location would not be rendered invalid by the failure of the claim-jumpers in September, 1913, to observe and repeat that or some other mineral discovery. And this conclusion holds good independently of whether the latter's object in going there was to make a discovery of lodes or veins if possible, or whether their object was to avoid such discovery as a step in destroying the lode locations and holding the ground with its then known rich placer deposits by relocations.

Speaking without reference to the cuts and openings (presently to be considered), what did they expect to determine simply by "going over the ground?" For much of their testimony begets the inference that they

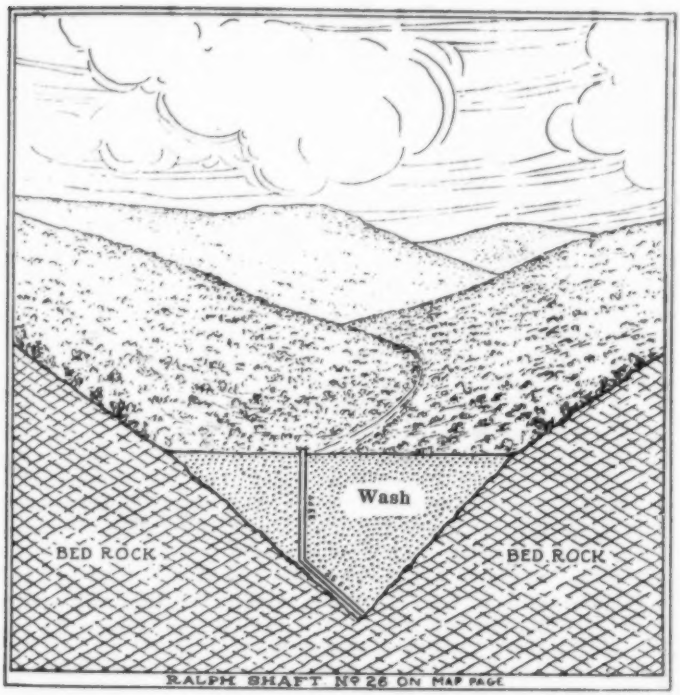
were entitled and expecting to see veins or lodes sticking around above the surface of the ground.

Lodes or veins are mineralized rock formation contained within fissures or crevices in the solid country rock which constitutes the mass of the mountains. The country rock, veins and all, is covered with a blanket of loose gravel, dirt and slide, not only on the slopes of Copper Canyon, where these locations are, but in every mountain country. The photographic exhibits show this, two of which are made part of Judge Ross's leading opinion below (249 Fed. 85-86). The convolutions of the surface manifest the form and shape of bed rock or the mass of country rock composing the mass of the mountain. The action of alternating heat and cold, weathering and attrition, storms and melting snows, is constantly disintegrating and crumbling the surface of the rock and manufacturing sediment, which is carried down the slopes into the canyon and out into the river valleys. Only such an accumulation of sediment and loose material remains on the slopes as the degree of slope and local surface irregularities will permit, usually a few inches or a foot or so in depth. This covers over and obscures the mountain of rock and the long coursing lodes and veins out-cropping therein like a suit of clothes (except here and there a point of rock protruding through it), and gives nurture to the short bunchy sage brush such as the court will note in the photographs. At the bottom or floor of the canyon, where the two slopes converge to receive it, the sediment gathers greater depth until over the center line or channel it attains a depth

Showing topography, contour of bed rock, and evident depth of soil at different points, about the buildings on Salt Lake No. 3. Looking south.




Copper Canyon at north part of Salt Lake No. 3. Showing mill, mill-road, cuts 1 and 2, houses, and old cabin known as Emanuel Pierce cabin indicated by J. J. on roof.




of 50 to 60 feet, and a breadth on the surface of from 50 to 150 feet. See table of depths of the surface layer at all the different cuts or openings on this ground, in Exhibit A, at pages 476-484. Aside from the shafts, cuts and openings which penetrate the surface covering to bed rock, how could these witnesses expect to observe any lodes or veins by simply "going over the ground?" Did they expect the lodes or veins to pop up out of the ground on their approach? What was their object in

giving such testimony? And if there is no issue made that the veins and lodes do exist, what difference does it make whether they stick up like a Chinese wall through this surface veneer of loose material with which the mountain side is carpeted or not?

If they had been anxious to know whether the locators and subsequent owners had discovered lodes and veins, they should have taken some of the dirt out of the bottom of the older shafts they spoke about.

COUNTRY ROCK.

And so far as the country rock being quartzite or something else, we don't see what figure that cuts, in view of their witness Boyle's statement (R., p. 428) that it had nothing whatever to do with the value of the claims, and that valuable mineral deposits exist in that region whether the general rock is quartzite or not. In Ambergris Min. Co. vs. Day, 85 Pac. 109-114, the Idaho Supreme Court took judicial notice that many of the most important mines are in quartzite formation. And in Alameda Mining Co. vs. Success Min. Co., 161 Pac. 864, that fact was part of the California court's findings.

GENETIC ORIGIN.

At record pp. 407-409, alluded to before, their expert witness, Mr. Boyle, points a distinction between veins that were formed by the geologic process of injection of molten matter into a fissure in the country rock, and those that were formed by hydrothermal and pneumatolitic agencies; i. e., by deposition from gases and vapors com-

ing up from the deeps, containing minerals in solution, or mineralizing waters percolating through the openings and interstices in the country rock. This subject is discussed on pages 418-423 of our brief, Exhibit A, and we need not add thereto further than to say that:

> "The intent of the United States mining statutes is not to make distinctions based upon genetic principles. What geologists may call beds of ore the courts may find to be lodes within the United States mining statutes authorizing the location of mining claims upon the public domain."
>
> Alameda Mining Co. vs. Success Mining Co., 161 Pac. 862-5.

But as Mr. Boyle coupled the genetic distinction with the further requirement of commercial ores (to be visible upon a superficial examination at that) contrary to the decision in Mining Co. vs. Cheeseman, 116 U. S. 529, 29 L. Ed. 712-4, it is unnecessary to follow the point further.

Anyhow, what bearing has it all if the *existence of veins* is not in dispute and their own testimony not offered for that purpose, as we see later?

VALUES AND COMMERCIAL ORE.

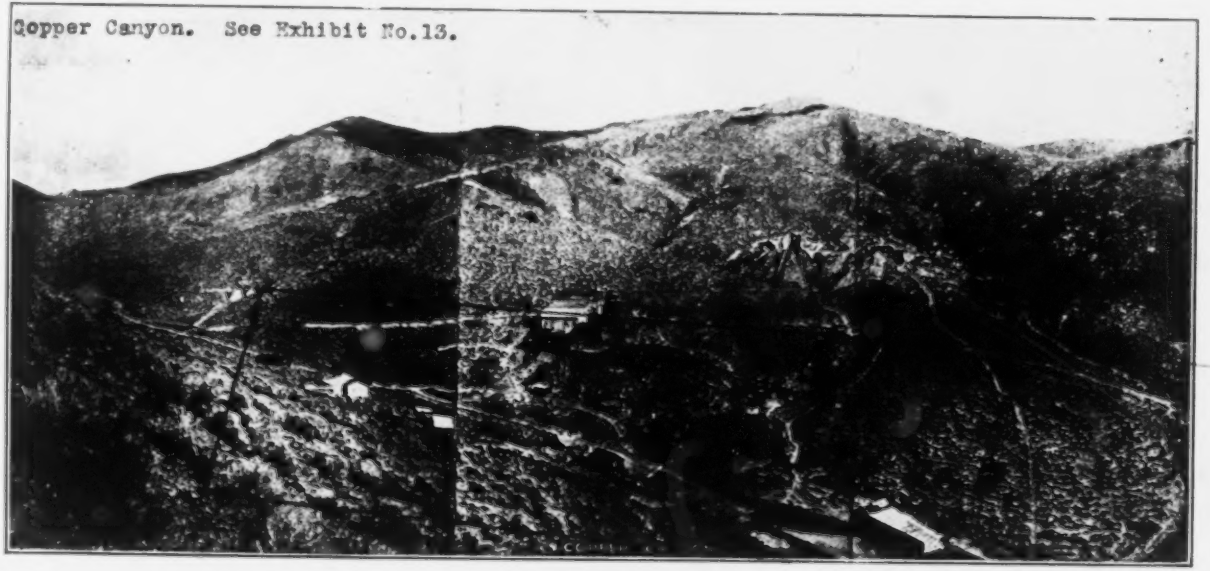
This is mooted by their general testimony first herein referred to. The requirement of commercial ore as essential to existence of a mineral bearing vein is contrary to the decisions of the U. S. Supreme Court and all other courts (see cases cited in Exhibit A, pp. 197-203, 370-1 and 302-414), but if they do not dispute

the existence of the veins what relevance has it? It throws no light on what the locators or former owners of the Salt Lake No. 3, Midas and Evening Star saw or discovered in these or other veins. This will come up for further consideration in connection with their testimony as to the cuts and openings (post p. 83.)

CENTER LINE OF SALT LAKE NO. 3.

On a parity with the foregoing is their testimony cited to the record in Sec. 496 (p. 526) of Exhibit A, wherein they describe the center line of the Salt Lake No. 3 as being "wash" or loose dirt from one end to the other, no hard rock outcrop and no lodes or veins exposed. Van Orman wavers a little about that, and says there might be some rock cropping near the center line. However they did not offer to show how thick or deep the surface mantle of loose material is before it touches bed-rock or country rock along the center line. If it is only a few inches deep it has no bearing on either the existence of veins or their former discovery. By referring to the map (249 Fed. 84) the court will see the roadway which follows the floor of the canyon, does not pursue the center line of Salt Lake No. 3 but a short distance until it veers to the west, and thence the center line projects itself upon the eastern slope where the surface soil cannot be very deep. See table of depths to bed-rock in Sec. 470 (pp. 487-490) of Exhibit A. And the photo at pages 481-483 of Exhibit A, also give information on this subject. See Ex. 13 opposite

Copper Canyon. See Exhibit No.13.



There was no attempt to prove that the surface of the center line or elsewhere has always been the same as now, so as to throw light on what the locators observed in way of mineral. Their man Healey testified to filling up one shaft in the fall of 1913. (R., p. 310). The original shallow discovery cut for the Salt Lake No. 3 had become obliterated and lost, as we see presently. Numerous cuts exist now on the ground that are partially filled by eroded material from the surface. How many others have been filled up no one knows. They did not take the trouble to uncover the bottoms of those now partly filled to get at the view-point of those who made them.

DISCOVERY POINT OF SALT LAKE NO. 3.

(See Exhibit A, pp. 527-9, Sec. 497.) They say the original discovery point of the Salt Lake No. 3 is obscured; no discovery monument in place; no hard rock at the point where it should be, but croppings near to north and east; material is "wash," and no lode or vein exposed there. But their witnesses do not know where the original discovery point is. It has become obliterated by the storms, cloudbursts and drainage to which witnesses on both sides testified. (R., pp. 240-1, 571, 584, 611.) The shallow cut which exposed the original vein discovery on the east slope of the canyon (R., pp. 560-3, 583, 599, 602, 615, 626) had become filled up and lost in the course of the years since February 2, 1897 (R., pp. 575, 583-7, 594-5, 607, 610) but other veins had been opened. The two Jory's who did the posting, staking and recording

the notice for J. H. Clive, the locator, in 1897, could not find or identify the point when brought back after this controversy came up. Clive himself had long before disappeared.

The only way petitioners could conjecture the discovery point was by computation from data in the location notice, which gave it as 255 feet from the north end, 1245 from the south end, and 300 feet to each side line. This when surveyed is said to have fallen at some point near one side of the floor of the canyon where the surface wash may be a little deeper than on the slopes, contingent on its exact position. But Jory, who staked the claim, testified that the discovery point was on the slope, or as he expressed it: "I would say it is up on raising ground; it is a little from the bed of the creek." (Rec., p. 609.) He and his brother stepped off the ground and posted the stakes and notice (Rec. 603-4-9), and owing to the unevenness of the surface and without transit or compass, it would be easy for them to have erred slightly in filling in the direction or distance in the notice. There is no testimony that the discovery point was not as Jory stated, a little up the slope from the floor of the canyon, and about 200 feet north of the Pierce cabin marked "J. J.," or that there was not a surface cut exposing a vein, which has since become obliterated. There is abundant evidence of a general fissuring and fracturing of the country rock in that immediate locality (Exhibit A, pp. 559-591) that is not disputed by anyone; including that by their witness Ray who spoke of the seams there that might have mineral in it (R., p. 523); the showing

as to veins in cuts Nos. 1 and 2, the mill bench and along the roadway, to which we will later recur. See photos of veins at pp. 571, 583 of Exhibit A. On some one of these numerous veins the original discovery was undoubtedly made.

DISCOVERY POINT, MIDAS AND EVENING STAR.

They sought to locate these also by reference to two painted monuments standing near the center of each claim, and they testified there was no openings there to bed rock. (Exhibit No. 1, Secs. 454 and 457, on pp. 462 and 471.) But Joseph Jurey, who located the claims for Joseph Farren and then conveyed to him, testified that these were not his original discovery monuments, but monuments placed there by Farren a little later. The discovery points were at cuts 21 and 24, hereinafter mentioned. (See Exhibit No. 1, at Sec. 416, page 407.)

CUTS, SHAFTS, TUNNEL.

We will now consider petitioners' testimony with reference to these, for therein the physical conditions at bed rock and at the veins are exposed. Considering that they do not dispute the existence of veins (see post p. 98-99 121-126 the purpose of some of their testimony is obscure, as it throws no light at all on prior discovery by the locators, or lack of it. Such of the cuts as are partly filled up, any mineral therein at the bottom at bed rock is no longer exposed, and requires no further attention. They simply did not prove anything either as against the existence of veins therein, or against

their former discovery in those cuts. But the cuts and tunnel that deserve further special mention will be referred to by their numbers on the map, 249 Fed. 84, to localize the same. They are:

On the Salt Lake No. 3, cuts Nos. 1 and 2, the "mill-cut" and the wagon road.

On the Midas, cuts Nos. 21 and 23, and tunnel No. 22.

On the Evening Star, cuts Nos. 20 and 24.

Their testimony concerning these cuts and tunnel is abstracted to the record as follows: Those as to the Salt Lake No. 3 in Secs. 498-501 (pp. 529-539) of Exhibit A, and those as to the Midas and Evening Star in Secs. 451-459 (pp. 458-475) of Exhibit No. 1. We will take up each cut and tunnel separately, and see if we can determine what it is that they proved, or endeavored to prove, in the absence of any enlightenment from the complaints.

CUTS NOS. 1 AND 2 ON SALT LAKE NO. 3.

(See Sec. 498, pp. 529-534 of Exhibit A.) Regarding these two openings they remained entirely silent in their direct examination of each witness. Simply left it to be covered by whatever inferences might be drawn from their general statements before considered, i. e., that they went over the ground and saw nothing that they would consider to be a vein, but nevertheless that they saw fissures, crevices, seams, fractures and veins in the open cuts of the country rock, which they did not believe would carry commercial values (ante p.....). But upon cross-examination their witness Moran testified

as in Sec. 498, pp. 530-3 of Exhibit A, that there is an exposure in cut No. 2 which he would call a "slip" and in cut No. 1 a "break" in the formation, that is practically on the surface. Petitioners objected to Moran's being questioned about these cuts on cross-examination, saying they had asked him nothing about it on direct. But it was drawn out nevertheless that these exist, and that ore might be deposited in those breaks and slips. And that if they carried values of $5.80, $9.60 and $11.30 per ton in three samples witness would develop it. That it may be termed a vein, but witness refers to it as a fracture, but if he should get a reasonably good assay from there he would probably call it a lode or ledge, and if the assays as above were obtained, would consider it worth while to develop as a mine. Their witness Phillips testified to taking a sample from this cut No. 1 which assayed $1.34 in gold and silver.

Respondent's testimony about cuts 1 and 2 is abstracted in Secs. 505-6 of Exhibit A, and shows that samples and assays of $5.88, $8.21, $8.88 and $11.14 were in fact taken from these two cuts on the Salt Lake No. 3 and photos of this vein (post p. 122.

THE MILL-CUT ON SALT LAKE NO. 3.

(Their testimony abstracted in Sec. 500, pp. 535-7, of Exhibit A.) Phillips and Moran say they examined in and around this mill-cut or bench and saw no lode or vein. But their witness Boyle looked and did see a "fault" crossing as he said at right angles to the length of the claim, in the mill bench. He thought enough of

it to take a sample for assay, and the assay certificate was not put in evidence. But he took another sample, No. 7, which was assayed, and the assay certificate showed "trace" in copper.

See respondent's testimony about the same point in Sec. 508, p. 578 of Exhibit A, and see photo of this vein at Exhibit A, page 583 (post p. 124).

MILL ROAD CUT, SALT LAKE NO. 3.

(See their testimony in Sec. 501, pp. 537-9 of Exhibit A.) This is the cut out of the mountain side from the floor of the canyon angling along the east slope to the mill on east line of Salt Lake No. 3 claim, about ten feet wide and 300 feet long, to make level enough to drive a wagon. It exposed the country rock formation and all veins, fissures, fractures, etc., along its course. Petitioners' witnesses were silent about this wagon road, as seen by Sec. 501, Exhibit A, except that Phillips took a sample from along the road, which assayed 63 cents in gold, silver and copper. Healey took another which assayed "0." What the purpose of these was no one knows, since it throws no light on prior discovery, and as stated, they are not disputing that veins exist. That road was made in 1912. See respondent's testimony about this road, in Sec. 509, p. 588 of Exhibit A.

The foregoing is the whole of their case as to the Salt Lake No. 3.

CUT 21, ON THE MIDAS.

(Petitioners' testimony abstracted in Sec. 452, pp. 459-462 of Exhibit No. 1.) Done in hard rock, Healey

took samples, did panning, got no results. Phillips took a sample which assayed only "trace" in gold, silver and copper. Moran saw no vein disclosed, Boyle however saw the "fracture zone" in that cut, showing copper stains. He took a sample therefrom, not to show whether the vein in the opening was of commercial value or not, but to show the "high degree of alteration" therein. There might be some rock in that vein which he did not assay which would be of commercial value, but doubts it. Did not even get down in the cut, because there was snow in the bottom. (R., p. 405.) Admits there are barren spots in all veins, but this looked like all barren to him. Couldn't see the bottom for the snow, and took his sample not from the vein but from the dump outside. Sample not assayed.

Witnesses for respondent made closer examination and took samples and assays. See their testimony in addition to but not in conflict with the above, at Sec. 462 of Exhibit No. 1. (Post p. 1267)

CUT NO. 23, MIDAS.

(Petitioners' testimony abstracted in Sec. 453, p. 462 of Exhibit No. 1.) Their witness Phillips took a sample from here which was assayed, but they did not give it in evidence. Phillips simply said there was no vein or lode exposed here. Why he should have taken a sample at all is not clear, unless they were sampling country rock against us. Respondent's testimony on this same cut is in Sec. 463, showing that Tibby took a sample from this cut showing an assay of $3.05 in gold, silver

and copper. If Phillips had taken another sample he might have gotten as good or better values. The whole story of values doesn't go with a single sample, for they admit that all veins have barren spots and poor spots. (Post p. 127)

TUNNEL NO. 22, MIDAS.

(Petitioners' testimony abstracted in Sec. 456, pp. 463-471.) This is a tunnel driven in solid rock about 75 feet long (R., p. 356) on the Midas location. Healey says there is a "streak" in there, and would not call it a vein or lode. Says thinks a man would be crazy to build a monument on it.

(Of course such a remark by a witness is not *evidence*. A witness gave the same testimony about a lode or vein on Anaconda Hill in Montana, which the court said in Clark Montana Realty Co. vs. Ferguson, 218 Fed. 959-962, was the richest on earth. Opinions without the facts is nothing. Exhibit A, pp. 364-5.)

Their next witness, Phillips, said "there is a fracture in there," containing decomposed or altered material, and different appearance. Took a sample from this tunnel which assayed "trace." Moran said there was a fracture in this tunnel, and the tunnel drifts on its strike or dip, which comes out to near the tunnel mouth. Mineralizing waters might deposit mineral in that, yes. If a sample of that material should assay $11.50 in gold, silver and copper, would call it a pretty fair assay, yes, and would develop it further. There are barren spots in all veins, yes. Boyle says there is a "selvage or crossing of ma-

terial" in this tunnel that came nearer approximating a commercial vein than anything he saw on the ground. Took assays from that, that were in evidence at the "former trial." Took his sample No. 10 also from this tunnel, and it assayed $1.46 in gold and silver. If it should appear that $11.50 assays in gold, silver and copper were taken from here, would say it was locatable as a claim. Not many mines pay at the very beginning, at the surface.

Respondent's testimony in addition to and not in conflict therewith, is in Sec. 464 of said Exhibit A, and shows a fuller description of the vein styled fracture, selvage, etc., as above, and that assays were taken from it, running from $2.75 to $11.87 in gold, silver and copper. (Post p. 128.)

OPEN CUT NO. 20, EVENING STAR.

(Petitioners' testimony abstracted in Sec. 458, pp. 472-3 of Exhibit No. 1.) Ray, Phillips and Moran say they saw no vein or lode, but there is brown-stained material. Boyle says there is a "crushed zone of country rock"; took several samples with no assay results. Phillips took a sample, assay "0."

See respondent's evidence on this cut at Sec. 465, pp. 505-9 of Exhibit No. 1, showing assays from numerous samples in this cut. There is no conflict. Each witness took the samples and procured the assay results that he testified. Neither disputes the other's testimony. Samples from the vein were mineralized and those outside of it but in the cut were not.

OPEN CUT NO. 24, EVENING STAR.

(Petitioners' testimony abstracted in Sec. 459, pp. 473-5 of Exhibit No. 1.) Done in hard rock. Healey, Phillips and Moran saw no vein. Boyle speaks of crushed and altered country rock here, with no distinct strike or dip. Took a sample which assayed 97 cents from it. Healey also took a sample from there which assayed $1.23. See respondent's evidence on this cut, in Sec. 466, showing a vein with distinct walls, with strike and dip, and sample yielding assay of 83 cents.

See also tables of samples and assays by all the witnesses for each cut, tunnel or opening, in Exhibit No. 1, page 392, and Exhibit A, page 450. (~~Post p.~~ . . .)

In view of these samples and assays, taken by both sides, and the confessed veins, fissures, fractures, breaks, etc., by which veins are always meant, it may not be clear just what some of their witnesses meant by saying they saw no vein. That is, some of them would see no vein where others of their own witnesses would see and recognize them. In the peculiar structure of the questions propounded is usually found the secret of it, in connection with their answers and subsequent testimony on cross-examination. For as seen before, and as abstracted at pp. 385-392 of Exhibit A, and 359-366 of Exhibit No. 1, they were holding that nothing would be considered to be a vein by them unless it carried pay ore or commercial ore at the surface. Yet their own sampling and assays, usually one sample from an opening (not testified taken from the vein areas therein), was inadequate to give the full story of values in any

vein or open cut. Their emphasis was entirely upon values and assays, which is not the test either in law or mining, as we show presently. But seeing they rest their case on values, what is their evidence that there are no values?

As shown, ante p. 71, Healey said he prospected and panned every cut where it showed a crevice or seam, here and there, and got no colors. (R., p. 283-4.) But panning, as shown by undisputed testimony at record pp. 778-9, 784, 279 (see Exhibit A, pp. 378-9, 385), is entirely inaccurate and unreliable as a test of values in solid rock like this. The rock was repeatedly spoken of as very hard by witnesses on both sides, and so altered or metamorphosed as to make it difficult to determine its genetic origin. If a pan would answer in such cases there would be little use for smelters with their liquid fire and intense heat. He might as well have said he chewed on the rock and got no results.

But the chief difficulty is he doesn't say he got his rock sample which he pestled and panned from out of the crevice or seam; but only that he got it from every cut where it showed a crevice or seam. In other words, wherever there was a cut or opening that contained a "crevice or seam" he took a rock sample from somewhere in that cut. Now as the dimensions of these cuts, shafts and openings usually extended beyond the limits of the fissure vein, or the crevice, Healey could very easily obtain an unmineralized rock sample from the country rock outside the walls of the vein, and it would be

still perfectly true that he took it "from a cut where there was a crevice or seam."

The same criticism obtains as to the testimony of Healey, Phillips, Boyle, where they testified to taking rock samples from "at" or "in" each cut or opening, which were assayed, and the results were "trace" or "0," except in a few instances there were values. Unless they took them from the veins or areas of presumptive enrichment there would be no reason whatever to expect values. Yet they do not testify that they did take them from the veins, and only by the fact that some of their samples were mineralized and yielded assays can we assume that any of their samples came from a vein.

The fact is that true fissure veins are so unevenly mineralized and the values so unevenly distributed therein, that it is very easy usually to get a barren sample from within the veins. Veins have inclusions of common country rock therein, same as that outside the vein; and the vein matter itself is often poor or barren at one point, and very rich at some other point, or moderately so. This is so common in mining, and the courts have so often taken judicial notice of it, that we need only refer to the decisions of the United States Supreme Court and other federal and state courts cited in Exhibit A, at pages 393-414, as to what is necessary to constitute a lode or vein, so far as values are concerned.

Thus in Mining Co. vs. Cheeseman, 116 U. S. 529, 29 L. Ed. 712-4, this court held that the elements of a locatable vein are the body of mineral and the boundaries. And that with the boundaries well established, slight

evidence of ore within the boundaries would suffice, even though at considerable intervals and in small quantities. And in Book vs. Justice Mining Co., 58 Fed. 106, 122-128, the court held:

> "The vein may be very thin, and it may be very thick, or thin in places—almost pinched out in miners phrase—and in others widening into extensive ore bodies. So also in places it may be quite or nearly barren, and at other places immensely rich. It is only necessary to discover a genuine mineral-bearing vein, whether small or large, rich or poor, within the lines of the claim located, to make a valid location including the vein or lode. * * *
>
> "A lode within the meaning of the statute is whatever a miner can follow and find ore; and a valid location may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following with the expectation of finding ore; and a valid location may be made of a ledge deep in the ground and appearing at the surface not in the shape of ore, but in vein matter only."

This holding has been followed in a thousand mining decisions in the West, in one form of words or another, and we need not fatigue the court further than to refer to the large number of them collected in our brief Exhibit A, at pages 393-414.

Petitioners reply nothing to this copious citation of cases or those cited and applied to the testimony herein on page .... infra. On page 11 of their brief are some cases holding simply that mineral discovery is necessary in a mining claim. We have never controverted that

principle. But their citations throw little light on what is necessary to constitute a sufficient discovery. Some of their citations, and those by Judge Gilbert below, are to cases involving oil placer locations. Insofar as any of these touch the subject of values, or commercial values, it is sufficient to say that a different rule obtains in oil placer locations from that immemorially held by the U. S. Supreme Court and other courts with respects to lode locations.

This difference grows out of the fundamental difference in wording between the oil placer statute (Act Feb. 11, 1897; 28 Stat. 528) and the lode mining statute (U. S. R. S., Sec. 2319). Under the former only lands that are "chiefly valuable for oil" may be located. Under the latter statute "all valuable mineral deposits" are declared to be open to exploration and purchase. This difference was held vital, and the basis for the distinction in the requirement as to the degree of values in the two forms of location, in U. S. vs. McCutcheon, 238 Fed. 575-585.

In oil locations, once you have struck "pay oil" you have demonstrated its existence through a considerable field, with more or less of uniformity. It is like tapping a reservoir by turning on a faucet through which the liquid flows until the reservoir is exhausted. Until the faucet is discovered and the reservoir tapped, with quantity and quality and quality of commercial importance indicated, there is no discovery that the land is "chiefly valuable for oil" anywhere in its length, breadth or depth.

But with respect to lodes and veins of rock *in place*, the case is different. Values may be very poor or im-

perceptible at one point on the vein, while a few feet or inches further on, or down, in the vein, very great values may be found, showing that the vein is immensely rich. The vein may be pockety and erratic in its uneven distribution of mineral values. Weathering at the surface often tends to leach out the values there and carry them down upon the vein, making richer values below. The vein itself may almost or quite pinch out, and begin again a few feet or yards furthen on, and may widen into extensive ore bodies at any point on its strike or dip. For making discovery of the vein itself, regardless of the degree of mineralization at the discovery point, it is sufficient, as this court held in Mining Co. vs. Cheeseman, supra, if the walls of the vein are clearly defined, and some mineralization is denoted. All the values will not "flow" out of a vein, like from an oil field when it is tapped by a well. Often much labor and tremendous expense is required to get down to big values on the dip of the vein, or to follow it into a mountain of solid rock. But already his location is valid, and the law has been complied with in the matter of discovery, before he ever finds ore of commercial value and importance. This principle has been upheld by the courts so often and for so long a time past, that it seems rather late in the day to question it.

Yet the theory of some of petitioners' testimony seems to be expressive of the proposition, that unless this ground were so rich, and the mineralization so general and diffused, that they could not have been able to take these rock samples they

testified to have taken, from, at, in or near to certain cuts and openings in the surface without not only getting mineral values, but also values amounting to commercial ore (regardless of whether they took them from vein areas or not), then they would be justified in saying that there was no vein, or nothing that in their judgment would be a vein. Such a theory is self-answering and nullifies the testimony of such of their witnesses as stated that they did not see what in their judgment would be a vein, in certain of the cuts or openings.

In most instances said testimony is nullified also by that of other of their own witnesses who testified that they did see the veins or fractures where the first did not, that might carry mineral, and from which productive assays were taken. Usually the samples taken by respondent's witnesses showed greater assay values than those from samples taken for petitioners. But this was not the fault of the assayers. It is stipulated that the assayers faithfully and correctly assayed the samples that were brought to them by each witness.

It is to be remembered also that in determining the existence of a vein, under Mining Co. vs. Cheeseman, 116 U. S. 529, 29 L. Ed. 712-4, and other decisions we cited, the fissure walls or boundaries are more important factors than the values. These Healey admitted when he spoke of "every cut where there was a crevice or seam." And their other witnesses admitted them repeatedly in the testimony we have cited to the record. They admitted them whenever said there were slips, breaks, faults, fracture zones, or veins, lodes or ledges, as they did

frequently. (See Exhibit A, pp. 511-539, and Exhibit No. 1, pp. 447-475), in which they admitted that mineral may be deposited. That commercial ore is unnecessary the courts have numberless times decided. That is for the miner to take his chances upon, so the vein or "lead" is there.

In considering this testimony also it is difficult to see what relevance or relation their testimony as to values in certain samples lately taken, has with the subject of original discovery by the locators so many years ago. The fact that their own witnesses took samples from the same cut, some of which were barren and some mineralized, that other samples taken for respondent had greater values, all go to show that no deduction can be made from one sample what another sample will assay. And if not, how can it be deduced that the original locators did not take other samples producing much higher values than those taken by any witness at the trial? And thus they may have made discoveries that would satisfy even the hostile petitioners? And since they admit now that the burden of proof was upon them, did they not have to prove that no such samples were in fact taken by the locators?

We admittedly have the fissures, with the two walls thereof and included material of different character and mineralization, even upon their own showing. These constitute a lode or vein locatable under the statute and decisions we cited. Granting that they exist now at the surface, and are exposed in openings, some of which were made before September, 1913, and what right have

they to contend that they were not discovered by or known to the locators before September, 1913? The cuts and openings could not have been made without the veins being observed. Not to speak of the other cuts which have been wholly or partially filled, and in which their witnesses made no attempt to disprove mineral exposures in the bottoms, nor explore to the former depths.

Of course had petitioners been able to so intensify their efforts and investigations on the ground, as to show demonstrably that no lodes or veins exist anywhere on the ground, or in the ground (if that were possible), then we apprehend they might have proved thereby that no lodes or veins were discovered by the locators. Because a thing cannot have been discovered where it does not exist, and never has existed. But that is contrary to the express testimony of several of their own witnesses and their own assays, which proved both fissure veins with boundaries and mineralization within the decision of this court in Mining Co. vs. Cheeseman, 116 U. S. 529. They not only did not prove there are no veins, but they never intended nor designed to prove it, nor to have the court or jury understand that they were trying to prove it, as we shall next see. Certainly parties offering proofs should be conceded best knowledge of the purpose and intended effect of their own testimony, and the sense in which they themselves understand and offer it. Petitioners' counsel declared again and again at the trial, and caused the trial court to rule, that the question of *the existence of veins or lodes* was not an

issue in the case. And that the sole question was whether *respondent had discovered* the veins prior to September, 1913 (date of the relocations). See record pages 511, 518-9, 761-2, 820-2-4, 829-830-2-4, 904, 959, 972-3, and consideration thereof in brief Exhibit A, pp. 630-646, and also in the following division hereof.

We look in vain through their evidence in the record, hereinbefore stated in substance, for any testimony tending to show that the locators of the Salt Lake No. 3, Midas and Evening Star, and their grantees, did not have knowledge of the lodes and veins in this ground prior to September, 1913. The necessary inference from proven facts is in accord with the legal presumption, i. e., that they did have such knowledge. And we repeat again as at the outset of this topic, that the petitioners did not prove that no prior mineral discovery had occurred; that the verdicts are unsupported and against the law; and that reversal should have occurred for this reason if for no other.

IV. Errors in Excluding Cross-examination, and in Reversing the Legal Presumptions and Burden of Proof.

## IV. ERRORS IN EXCLUDING CROSS-EXAMINATION, AND IN REVERSING THE LEGAL PRESUMPTIONS AND BURDEN OF PROOF.

The trial judgments should have been reversed in the Circuit Court of Appeals for the following additional reasons:

The petitioners had placed their witness Robert Phillips on the witness stand and caused him to testify at record pages 504-510 that within the last few weeks before the trial, but since the suits were begun, he had been over the ground of the Salt Lake No. 3, Midas and Evening Star lode mining claims, and had taken twelve samples of rock from designated points. That these samples had been turned over to their attorney and assayed, and seven of the assays were put in evidence and five withheld. Of the seven put in evidence, all showed "0" or "trace" in the matter of values, except one which showed $1.34.

The substance of this testimony was subject to all the criticisms we have made in the previous topic. There was no issue in the complaints to which it might have been directed. The samples were not testified to have been taken from vein areas, so as to make the question of values therein of any importance. And if they had been, the petitioners were not disputing the existence of veins but only their former discovery. And the samples threw no light on what samples or assays or knowledge of veins had been obtained by the locators.

But whatever its purpose or relation to the issues, it is the substance upon which they asked for and obtained the verdicts and judgments. And the suppression of part of the witness' findings was unfair to defendant, who sought to cross-examine him as follows at record page 510:

> MR. SPRINGMEYER: Mr. Phillips, you took samples other than those the assay certificates of which have been admitted in evidence, did you not?
>
> A. * * * I took twelve altogether. How many has been admitted in evidence?
>
> Q. How many of those are in evidence?
>
> MR. THATCHER (for petitioners): There are seven in evidence, Mr. Springmeyer.
>
> MR. SPRINGMEYER: Now of the samples that are not in evidence, were there any that returned values in assaying?
>
> MR. THATCHER: I have not offered any evidence as to what the values were, merely that he did take the samples; and we object unless it be shown that the cuts and openings from which they were taken were actually on the ground and excavated at the time of the location of the Homestake. (Argued.)
>
> THE COURT: I do not think any discovery which was made on the ground subsequent to a valid location made by plaintiffs can be of any value to you. In other words, if last week you went upon that ground and discovered ore on the Salt Lake No. 3 worth a thousand dollars a ton, I don't believe it would do you any good, if the plaintiffs made a valid discovery and location before you made this shaft. *It is not a ques-*

> *tion whether there was mineral in the ground,* the *question is whether there was a discovery made,* and if you discover anything there, no matter how rich, after a valid discovery and location by others, it does not avail you; for that reason I think the objection is well taken. I will allow you at the present time to question the witness as to any samples that were taken by him from openings in existence, or from exposures that were in existence at the time these locations were made.

This and similar rulings were excepted to and assigned as error. The trial court had no right to assume in his ruling that plaintiffs had made a valid location. That was being disputed, and was subject for a jury finding under proper instructions from the court after all the evidence was in. Until the verdict should be returned the earlier locations were presumptively valid and the junior locations consequently presumptively invalid. Plaintiffs were there trying to reverse these presumptions by putting in evidence to establish invalidity of the prior locations. Their own witness, Phillips, was then on the stand to aid them in their self-appointed task, and to submit to cross-examination thereon.

In seeking this privilege, it was not an attempt by respondent to establish a belated discovery, as the court seemed to contend. We were not then trying to establish anything, as an affirmative matter, but we were trying to bring out clearly all of the facts about which the witness had testified in chief. If incidentally that should show the existence of mineral-bearing veins in the ground

contrary to plaintiffs' wishes, the fault and misfortune, if any, would be that of plaintiffs who had put him on the stand and questioned him in part as to samples recently taken by him, and the degree of mineralization thereof. If the witness told only a part of what he knew, he could be asked to tell the balance, and so tell the whole truth. (See decisions cited in Exhibit A, pp. 613-620.) Whatever might be thus drawn out would still be plaintiffs' testimony. It was not our time, in the order of the trial, to prove discovery or anything else, until after plaintiffs finished and rested, after having made a case.

And so far as the distinction taken by the court at the close of its ruling, supra, as to openings or exposures in existence when the junior locations were made, it is unsound. Because the witness when testifying in chief had made no such distinction. (Rec., pp. 504-510.) He simply testified that he had taken twelve samples of rock which had been assayed, and the assays of six or seven of the twelve were put in evidence showing "0" or "trace" in values (R., pp. 508-510) except one which showed values. And as to six of them there was silence. And so, regardless of whether or not barrenness of one assay and mineralization of another proves anything against either the existence of a vein or prior discovery thereof—they had caused him to testify that way and we were entitled to cross-examine him about the omitted ones.

Again at record page 516 plaintiffs were still asking Phillips about his twelve samples, and he testified that

his sample No. 7 was taken from the Midas tunnel (No. 22 on map), but not that it was from the vein therein, or "fracture," as he had called it. Objection being made the court again ruled, record, page 518:

> "In your (defendant's or respondent's) case it is not for you to prove that there is mineral in the ground; it is for you to prove that before the placers were located you had discovered mineral; and if the mineral was exposed at that time we may safely presume, if it was discovered in some of your workings, that you had discovered it. I think I shall only admit assays to show lode values * * * taken from surfaces exposed prior to and at the time the placer locations were made."

Unless, in other words, defendant could do that which plaintiff had not even attempted to do, i. e., show the condition of mind as to knowledge of veins possessed by the original locators, and do it in advance of his defense at that, he was not to be permitted to cross-examine.

The court's test of admissibility was purely hypothetical and not based upon any evidence on direct as to whether the area where the sample was taken had been exposed at the time stated or not. The witness had merely stated he took his sample No. 7 *"from the tunnel."* Now about 25 feet of that tunnel had been done in 1912 and about the same in 1913, with about 20 feet of cross-cut in the center (Rec., pp. 650-2 and 886), the whole tunnel being about 75 feet long, as their witness Moran testified (Rec., p. 356). The vein

or fracture as they called it, comes well out to the mouth of the tunnel and extends back, dipping into the floor of the tunnel about 15 or 20 feet from the entrance (see testimony for both sides at record, pages 356 and 913, and Exhibit No. 1, at pages 468 and 500-1). Hence this whole vein, which was within the first 20 feet from the tunnel entrance, had been exposed in 1912, the year before the pretended placer locations, or earlier. And unless they will confess there is still another vein further in the tunnel, their sample No. 7, if taken from the vein at all (which was not testified), was taken from an area exposed prior to the placers, and hence there was no occasion for the court's ruling or distinction. If not taken from the vein it had no relevancy anyhow. But cross-examination should have been allowed to find out all about the conditions where the samples were taken.

But it is with the principle of the ruling that we are concerned, for as so enunciated, it continued to be applied against respondent intensively after he had entered upon his defense. Under it plaintiffs need not disprove prior discovery or knowledge of the veins at all, but respondent had to prove that affirmatively. In other words, the prior lode locations were presumed bad and invalid, and they had to be proven valid. Much as if an indicted person were to be presumed guilty before trial and compelled to prove himself innocent, and without anything being alleged against him.

Thus at record, page 756, Parker Liddell, a surveyor and mining engineer, was on the stand as a witness for respondent. We had to gather an idea of what the

lawsuit was about from the plaintiffs' evidence, and try in some wise to meet it, as the complaints were silent about any invalidity. Liddell had surveyed these lode locations and the whole canyon group in aid of defendant's patent application in 1914, and while surveying had noticed some of the veins. He was asked by defendant's counsel to describe them, and was about to answer thus:

> A. In the open cut first referred to (cut No. 2 on the Salt Lake No. 3) there is a four-foot——

when he was interrupted by plaintiffs' attorney as follows:

> MR. THATCHER: When did you see this vein that you are going to talk about now?
>
> A. May 8th of this year.
>
> Q. You didn't see it any time prior to Sept. 6, 1914 (1913?), did you?
>
> A. Not to recognize it as a vein at that time.
>
> MR. THATCHER: Objected to as incompetent, etc., and as being a discovery of a vein which he saw and found after the initiation of the title of the Guy Davis placer.

Now there was no pretense or color of ground for this objection. The validity of the Salt Lake No. 3 did not depend upon any discovery of mineral so late as 1914 and the testimony was not offered for that purpose. It was offered to prove the existence of a vein, as an element in the proof of former discovery within the rule in 15 Nevada, 383, and within the rule of admissibility stated by petitioners themselves in their

briefs in this court. The witness was not predicating any discovery by himself in 1914, but merely testifying to the existence of a vein. Yet the court sustained the objection (Rec., p. 758) as though it were a discovery by the locator or owner of the claim made at that date; and coupled therewith, "unless you can show," etc., again placing the burden of proof of former discovery on defendant, rather than requiring the plaintiffs to disprove it. And this notwithstanding that the point on the vein where the sample was taken was within a foot and a half of the surface (Rec., p. 760), and that the vein itself extended to the surface before the attempted relocations in September, 1913 (Rec., pp. 814-823).

At record page, 764 & seq., this court will notice that counsel for defendant was obliged to restrain his questions in each instance to what the witness himself knew prior to September, 1913, or it was shut out. Notwithstanding the witness himself was not a locator or owner of either lode claim, and he was not on the stand to prove a discovery by himself.

At record, page 769, witness Liddell testified concerning an open cut No. 60 on the Evening Star, which had been opened and exposed since long before September, 1913, but it had been sunk a little deeper since then on the vein. Witness took a sample and made an assay therefrom at a point in the vein as high as he could reach, standing on the bottom, but 3 to 5 feet under the floor of the cut as it formerly existed. On record page 771 plaintiffs objected to it because not from

an exposure "at the former trial." The court excluded it. (Rec., p. 772.)

At record pages 773, 818-9, 821, 826-830, 902, and elsewhere the court seemed to go further still, and hold that proof of a vein by defendant must identify it as the original discovery by the locators, notwithstanding he could show it was known to the owners prior to September, 1913. This is clearly against the settled rule of law in such cases (see decisions in Exhibit A, at pages 456 and 472; also Mining Co. vs. Tunnel Co., 196 U. S. 337-345, 348-352; 25 Sup. Ct. Rep. 266; 49 L. Ed. 501.

At record pages 820-1 the witness testified to taking samples from a vein in cut 2 on the Salt Lake No. 3, the vein material of which extended to the surface prior to September, 1913, but the sample was taken from a point below the surface exposure at that time. It was objected to on record page 820 and the assay was excluded (page 822), ruling repeated on page 824.

At record pages 824-830 the witness testified to an open cut No. 20 on the Evening Star claim containing a vein, the material of which extended to the surface prior to September, 1916, because the cut could not have been opened at all at the surface without exposing it, but the samples and assays were taken from a point below the floor of the cut at that time, and it was excluded upon objection at record page 830.

At record page 831 the witness was asked about a vein exposure in the roadway to the mill (which was constructed in 1912) with resulting exposures of the

country rock along its course, all prior to September, 1913. The witness said the grading for the road cut out a portion of the vein, so that in the bank of the road you could see the vein, but his sample was taken at the bottom of a 10-foot shaft sunk on the vein by the road-side, since that time, although the vein extended to the surface before 1913. The assay was objected to and excluded (Rec., p. 832). Ruling repeated at page 834.

At record pages 904-5 the witness Tibby was hampered and prevented in testifying about the same vein, and the assays he made of the vein, though he testified the vein came right up to the surface, same as Liddell.

At record pages 957-960 defendant Ralph's paper drawings or sketches of the veins were excluded because they disclosed more of the vein than was exposed in September, 1916.

On record pages 966-7 defendant Ralph was not allowed to testify about the roadside vein at cut 2 (identified above by Liddell and Tibby) although he testified he knew about the vein and had seen it in the roadway before September, 1913, because he could not tell how much of it he saw before, and how much of it became visible afterward. And at record page 971 he said of this vein that in September, 1913, there were croppings and no cut or shaft; but now there is a cut 4 or 5 feet wide, 12 foot face and 15 feet long, and a 4 foot vein. It was moved to strike out the "4 foot vein," and the motion was sustained (R. p. 972), but the witness continued to testify about it, and that he had taken a

sample from a foot below the 1913 surface, but it was excluded (R. p. 973).

And on many record pages defendant's questions were obliged to be warped to exclude proper testimony by the necessity to limit the same to what witnesses knew of exposed surfaces prior to September, 1913, regardless of what the original locators might have known. Vide record pp. 761-2, 820-3-4-9, 830-2-4, and also record pp. 753-8-9, 764-5-6-8-9, 770-2-3-4-5-6, 785-6, 798, 801-2-3-4-8-9, 811-2-4-5-6-7-9, 824-5-6-7-8-9, 831-2-3-7-8, 842, 861-3, 893-4-5-6-7-8, 902-4-5-6-7, 911-5, 940, 957-8-9, 960-1-6-7-8, 970-1-2-3-8-9, 980-3-4-6-7, 995-4-9, 1132-3-4-5-6-7, 1051-2, 1120-1, 1139, 1140-1.

Thus a great amount of affirmative evidence of the existence of locatable veins or lodes in each of the three claims was excluded in advance, because it was not in defendant's power to go out into the dim and forgotten past and prove by dead or unobtainable witnesses that this, that, or the other vein was in fact known to the locators or subsequent owners before September, 1913. Notwithstanding that the veins projected themselves into immediate contact with the surface, with perhaps a flimsy covering of dirt or soil at places. Under the ruling, defendant would have to do that which plaintiffs should have done if they wished to question validity of the locations, viz.: excavate the dirt and accumulations in the bottom of the old shafts to see if those who made them had discovered mineral in the bottom, and do it ex post facto at that. That is,

when confronted for the first time at the trial with the necessity to do so.

Defendant himself was but a recent comer in 1913, and could not tell what was known to the original locators. Some of the workings had been developed and extended somewhat after September, 1913, but without foreknowing that any such distinction would be drawn, no record had been kept of the date and amount of extension in each separate working. These could only be approximated in each instance. Yet so strictly was the line drawn, that no evidence on his behalf of the existence of a vein was permitted, unless he could show by inches that the exact point was exposed and known by him prior to September, 1913.

Nevertheless the petitioners now admit and state in their briefs that proof of the existence of a vein or lode, mine or deposit, may be of such character as of itself to establish the fact of discovery thereof by the original locator; and that so long as its existence is established the federal statute is satisfied (ante p. 44).

And that is in fact the rule announced by the Supreme Court of Nevada in the case of Southern Cross Mining Co. vs. Europa Min. Co., 15 Nev. 383, i. e., that proof of the existence of a vein now is elemental in proving its former discovery and with the recorded location notice amounts to proof of discovery. It is said that veins do not grow up and become mineral bearing in a year or two, and proof that they exist now is proof of their existence when the claims were located. (See cases Ex. A, p. 629). If these veins were in fact at

and near the surface where they could easily have been seen or discovered by the locators, the law presumes that they were discovered in favor of old recorded locations often transferred; and the extent of the knowledge possessed by respondent or his other witnesses as to what was formerly known is not determinative. Especially when the veins are so situate as regards the surface and surface excavations as to make the inference of knowledge irresistible.

The true rule of law is directly opposite to that ruled by the trial court. For not only is sub-surface conditions pertinent, but evidence of general mineralized conditions on adjoining claims and throughout the district is material in all such cases. See decisions cited in brief Exhibit A, at page 630, Erhart vs. Boaro, 113 U. S. 528; 28 L. Ed. 1113.

But with respect to the burden of proof as ruled by the trial court, we are reminded again that on page 6 of their petition for certiorari in this court, petititoners stated that they assumed the burden of proof and made certain proofs. This seems strangely incongruous after reviewing the trial rulings which they procured. They may be now thoroughly convinced of their own and the trial court's errors in this respect, and yet may have another lapse in this court as they have often had before.

When in this mood they have cited us to Bonner vs. Meikel, 82 Fed. 967, and assumed therefrom that because petitioners are placer claimants and respondent a lode claimant, respondent was bound to establish his own or his grantors' prior lode discoveries, and also

to show that the lodes are more important and valuable than the placer deposits on which they pretend to base the junior locations. Of course it would result from part 2 of this contention, if law, that no mining location would ever remain valid after the discovery later of some form of mineral therein more valuable than that upon which the location was made, though entirely valid and sufficient at the time. This is flatly ruled against by this court in Clipper Mining Co. vs. Eli Min. Co., 194 U. S. 220-3; 48 L. Ed. 944, as well as by the common sense of it.

But Bonner vs. Meikel upholds no such contention as part 1 of the above contention. It holds in unity with the decisions ante p. 13, 62-63 that the burden is always on a junior locator in contesting a senior location or grant. It is in agreement with the U. S. Supreme Court decisions cited in our brief, Exhibit A, page 355, which holds that where a junior lode claimant seeks to locate his claim upon a prior townsite or railroad because of what he contends to be a "known lode" within the exception of those acts of congress; i. e., a lode known to exist when the prior grant took effect—he is held to a high degree of proof of the extent, value and commercial importance of the alleged known lode. Also that it was not only known to the prior claimants at the time, but then known to be commercially valuable. Otherwise the junior claimant cannot intrude on the ground to locate the lode, no matter how important or valuable it subsequently turned out to be.

With that rule we have no quarrel. And were it

not for the disposition to twist court decisions to inhospitable facts, we would not need refer to or discuss it. But as they have cited Bonner vs. Meikel and similar cases before, and may do so again, it is necessary to point out that petitioners here are not the senior locators, nor is respondent seeking to invade a possession prior to his own. He is claiming nothing by way of an exception out of the placer statute (U. S. R. S., Sec. 2333). He is claiming as. a senior lode locator under U. S. R. S., Secs. 2320 and 2332 respectively, and not in opposition to earlier claimants who would presumptively own the ground. It is petitioners who are junior claimants, and it is they who are hampered by the presumptions and burdens of proof that always attend and obstruct an effort to take that which presumptively belongs to another. (Citations Exhibit A, pp. 353-6.) They are further hampered by the fact that under U. S. R. S., Secs. 2320-2 and 2332, known placer deposits are not excepted out of a lode location, on a parity with the exception of known lodes out of a placer location under U. S. R. S., Sec. 2333. And it is unimportant when such placer deposits became known to the owner of the lode claim. They belong absolutely to the lode claimant, regardless of when discovered.

Having obtained these rulings, and thereby excluded a large amount of evidence of veins, the existence and position whereof would import their own discovery and satisfy the federal statute as they now admit, they are not in position to argue as in their latest briefs

that this is not lode mining ground, or that there had been no prior discovery thereof.

But the court erred in the rulings in question, and being assigned as error, the Circuit Court of Appeals could have reversed on that ground.

## V. RESPONDENT'S SHOWING AS TO VEINS.

It is respondent's contention in view of all of the foregoing that he was not put upon proof either as to the existence of lodes and veins on the Salt Lake No. 3, Midas and Evening Star, or as to prior knowledge and discovery thereof by his grantors and predecessors in interest. No prima facie case was made against either proposition by petitioners as plaintiffs at the trial. But we have thought it proper to consider the case first upon their own complaints and testimony, and upon their own objections and procured rulings at the trial, before going to the consideration of any testimony on behalf of defendant. Non-suit should have been allowed by the trial court.

We will however now look at the testimony for respondent as to lodes and veins. The court will observe that this in no manner conflicts with any testimony delivered on behalf of the petitioners, but is consistent therewith and in addition thereto. It is both preface and supplement to such information, in way of physical facts, as was vouchsafed by the petitioners. It is entirely true that petitioners' witnesses and counsel profess to have a different opinion or conclusion upon certain of the facts than that that reached by some of respondent's witnesses based upon the same and other uncontradicted facts. And they also differ from the expressed opinions of the United States Supreme Court upon similar or less favorable facts to respondent than is shown by these records. But the domain of reasoning and conclusions is an open field to everyone, and we do not begrudge

them the common privilege. The point we make is that such opinions and conclusions are not evidence, and afford no basis for the conflicting evidence rule for which they hanker. Certainly mere opinions cannot prevail against the physical facts as to vein fissures, their boundaries, strike, dip, included material of different character and mineralization testified by their own witnesses as well as those for respondent. (Ante p.....) These being the determinative factors. It is for the courts to apply the law and the principles in Mining Co. vs. Cheeseman, 116 U. S. 529, when the facts are undisputed.

The following evidence for respondent was filtered through all the maize of adverse objections and unfavorable rulings at the trial, and stands absolutely uncontradicted and unimpeached.

THE SALT LAKE NO. 3 LOCATION.

In Exhibit A, at pages 187-192, we have abstracted the testimony of John Jory and Joseph Jory, with record page citations. These two men were employed by J. H. Clive (R. pp. 564 and 604) to perform the labor of posting and monumenting the claims and record the notices on the Salt Lake No. 3 and other claims of the Copper Canyon group on February 2, 1897, which they did. John Jory testified that they found quite a large outcrop of mineral-bearing vein sticking up in a small cut which had already been excavated, throwing out a little dump and uncovering the lode, which was about 18 inches wide. The vein contained iron and copper

stains with chloride in the quartz, and witness would say the chloride would carry gold and would assay. They made no assays or tests, but in his opinion at the time it would carry assay values in gold and silver. The vein was of different material from the country rock on each side in this, viz.: it was ledge matter, and the country rock was different altogether. Iron and chloride was mixed through the quartz, and the ledge dipped easterly. In his judgment as a practical miner it was a vein and carried mineral of value. Between walls it was all ledge matter. They then posted and monumented the ground, and filled out the location notices for Mr. Clive, putting one copy of it in the location discovery monument of the Salt Lake No. 3 and the other was recorded according to law. The testimony of his brother Joseph Jory, who assisted, was the same as that of John Jory (Exhibit A, pp. 189-192).

At record page 576 petitioners' counsel cross-examined the witness by a question implying that it was his inference or guess that the vein carried gold, silver and copper, to which he answered, yes, to the best of his judgment as a miner. They have sought to make something of this, but it adds nothing to the previous stock of information, viz.: that the witness saw the vein which was ledge matter, different from the country rock, and in his judgment as a practical miner carried values in the precious metals. It was not a guess in the sense that the opinions of petitioners' witnesses were guesses, who never saw the veins on which the locations were made.

Petitioners also have contended that the above testimony is not sufficient in the absence of assays to prove the existence of the vein at the Salt Lake No. 3 original discovery point. But assays do not have to be taken to establish the existence of a vein or warrant a location thereon. See the following cases where like testimony or less explicit in character was held sufficient to prove mineral discovery and assays were held unnecessary:

Muldrick vs. Brown, 61 Pac. 429;
Lange vs. Robinson, 148 Fed. 801;
Davidson vs. Bordeaux (Mont.), 38 Pac. 1075;
Shreve vs. Mining Co., 23 Pac. 320;
Bevis vs. Markland, 130 Fed. 226;
Other citations in Exhibit A, pp. 198-203.

Further, even if a location without an assay were insufficient in law, Jory was not the locator but Clive. Clive or a man named Johnson for him, took Jory out in the morning and showed him what and where to locate (R. p. 592) and the vein was already uncovered then. Clive may have taken splendid assays for all that appears. Clive himself had long before disappeared and was not available.

Petitioners in their brief have often stated that these Jory brothers were themselves the locators of the Salt Lake No. 3, but the record does not warrant this statement.

It is true the discovery cut and the vein in it subsequently became obliterated by the storms and drainage, cloudbursts, etc., to which the Jorys testified, so they could not find it when they were sent for by

respondent in 1914 after this controversy came up. But this does not affect the location any more than obliteration of stakes, markings and monuments once duly erected. (Citations Exhibit A, page 351.) An incident of the search therefor was the finding of the old tin baking powder can partly rusted away, containing the original duplicate location notice that had been put into the location monument of the Salt Lake No. 3, but the monument itself was gone, and the tin can was not where the Jorys left it. This may have been due to the jumpers' activity, as one of them (Davis) was there parading around and would not let Jory on the ground to look for it when he first called for that purpose. This was while the injunctions were being asked for. See generally the Jorys' testimony (R. pp. 556-626). No word of contradiction of this testimony appears anywhere in the record.

The remaining testimony for respondent concerning lodes and veins showing on the Salt Lake No. 3 now and at the time of the attempted relocation by the jumpers, is abstracted to the record in Exhibit A at pages 541-591. All data of a general nature therein, not localized to certain cuts and openings, apply equally of course to the Midas and Evening Star locations. At page 541 & seq. of Exhibit A begins the testimony of Benj. F. Tibby, a mining expert by education and training (R. pp. 539 and 889). No word of contradiction of his testimony appears in the record, nor does he contradict the statements by petitioners' witnesses that they "went over the ground" or that they took certain rock

samples, some of which were unproductive, etc. He occupies a new field in the record. He gives some interesting scientific facts concerning the ground generally and the character of the metals or minerals found there, and of the vein material. He testified that copper is soluble and is carried down in the veins by the processes of weathering, so that the story of values would not appear on the surface. (R. p. 936.) That placer values are eroded material from the veins in the slopes above (R. p. 938), and that a vein-cropping does not always show as a projection, but where the vein is softer is sometimes evidenced by a depression at the surface (R. p. 938). He saw and testified to the existence of several veins exposed in the cuts, workings and surface of the Salt Lake No. 3, Midas and Evening Star, and took samples and assays thereof. He also made chemical and petrological tests of the vein matter and showed clearly why there was no difficulty or doubt about his determinations (See Exhibit A, at pp. 546-555, where the record pages are cited). No witness traversed his testimony.

Beginning with Exhibit A, page 559 and on, both Liddell and Tibby, as well as respondent Ralph, testified in extenso regarding the existence of the fissure veins, their walls, the included material, its strike through the country rock, and its dip or departure from the vertical in its downward direction, so far as visible, and the mineralization of the different samples. Much of this testimony was cut in half, it is true, by the rulings of the trial court upon the petitioners' objections. But enough remains to establish the prime requirements of

DEFENDENT'S
EXHIBIT No.45.

the existence of a vein, i. e., walls, strike, dip, and included material of different character from the surrounding country rock, and substantial mineralization.

The roadside cut No. 1 and vein showing therein is described at Exhibit A, pp. 559-568, together with the samples taken from the vein and the assay results therefrom.

Then respondent's evidence as to cut No. 2, which is not far from cut No. 1 on north end of the Salt Lake No. 3 (see map, 249 Fed. 84), with its vein showing. For brevity all the testimony about this is collected and cited to the record in Exhibit A, at pp. 568-577, which we bid the court read. (See photo of this vein opposite.)

Then turn to Exhibit A, pp. 530-534, where all of petitioners' testimony concerning the same two cuts 1 and 2 is collected and cited to the record. There is no conflict. As there shown, petitioners chose to remain silent altogether about these two cuts and the veins showing therein, on their direct examination. But on cross-examination (Exhibit A, pp. 530-534) they admitted that there were within cuts 1 and 2 certain changes in the solid rock formation, which they termed variously "slips," "breaks," "fractures," etc., in which ore might be deposited, and if assays therefrom showed values of $5.80 to $11.30 a ton (as testified later by respondent's witnesses) it would be worth developing as a mine. There is nothing contradictory about that. Even their own witness Phillips took a sample from here that assayed $1.34 (Exhibit A, p. 534). See also

the photograph showing one wall of this vein at Exhibit A, page 571, or ante p. 122

In view of the foregoing (which is all the evidence as to the veins in cuts Nos. 1 and 2), how the trial court erred in its instruction to the jury at record page 1231, suggesting that there was a conflict of evidence as to whether Mr. Ralph (respondent) had discovered this vein in cut 2. There was no conflict whatever that the vein in cut 2 was exposed, and that it extended to the surface at and prior to September, 1913. See Liddell's testimony, Exhibit A, pp. 568-573; also Tibby's and Ralph's at Exhibit A, pp. 573-577. No witness for petitioners testified to the contrary. It was not necessary, for that matter, for Mr. Ralph to have discovered that vein, if it or some other vein at the surface was or could have been discovered by the locators. The existence of such veins at the surface satisfies the statute, and proves former discovery as petitioners say in their brief. And see 15 Nev. 383. So that, even if a conflict had existed as to Mr. Ralph discovering this vein, it would be a conflict upon an immaterial matter concerning which no instruction was due the jury.

MILL-CUT.

Going now to the mill-cut, so called. In 1912 a reduction mill had been erected on the east side of the Salt Lake No. 3, and it had been necessary to excavate and blast out a set of benches for the mill and the leaching tanks, as at every place where anything is constructed on a hillside. This duly exposed a mineral-bearing vein

DEFENDENT'S
EXHIBIT No.20

on the Salt Lake no. 3. See the respondent's testimony about this vein cited to the record on Exhibit A, pages 578-587, and a photograph of the vein at Exhibit A, page 583, extending right up to the grass roots at the surface. Compare this testimony with that for petitioners at Sec. 500, pp. 535-7 of Exhibit A. (Ante p.85.) While their Phillips and Moran say they found no vein or lode there, their witness Boyle did see it, but he calls it a "fault" or a "fracture zone" (R. p. 401). At record page 447 Boyle says he took a sample from a small seam in the lowest excavation of the mill, which was assayed with no results (Exhibit A, p. 537). Whether this "small seam" in the "lowest excavation" for the mill was the same as the vein shown in the photo (Exhibit A, page 583, opposite p....) does not appear. But if it was, the difference is merely in names; the photo shows for itself. Using "small seam" for "vein" was merely the customary way of minimizing what they saw. There is no dispute that Liddell and Tibby obtained the assay values they reported (see Exhibit A, pp. 579, 585), or that the photo correctly reproduces the vein itself.

And without taking further time, the testimony for respondent as to the veins, fissuring and fracturing along the hillside road on the Salt Lake No. 3 (Exhibit A, pp. 588-591) may be compared with that for respondent at Exhibit A, Sec. 501, pp. 537-539. Even their Phillips managed to get a productive assay from one of the veins along the road. (Ante p.86.)

THE EVENING STAR AND MIDAS LOCATIONS.

Joseph Jurey and Wm. T. Jurey located these claims March 27, 1907 (R. pp. 636, 642-3), but did it for Joseph Farren, who picked the ground and instructed the locations (R. p. 716). Jurey located in his own name and then conveyed to Farren (R. p. 1099). Joseph Jurey testified about the original Midas and Evening Star discoveries as at Exhibit A, pp. 114-115, where the record pages are cited. The vein or lode showing is about the same as that by the Jorys on the Salt Lake No. 3, and is sufficient under the same authorities (ante pp. 104), though no assays were taken at the time. Jurey testified of the Evening Star lode that it was a "big vein," maybe 20 feet wide, that was gold bearing and copper, a little silver (R. pp. 531-2; Exhibit A, pp. 114-5). This is the same point on the ground afterwards identified by the witness as cut No. 24 (see map, Ex. A, p. 10, and 249 Fed. 84). The Midas discovery vein was about two feet wide, quartz with iron or copper stain and porphyry between the walls, and the vein was opened 10x10x6 feet, later identified as the same point as cut "21" on the map. There was no testimony to dispute the fact of original discoveries on the Midas and Evening Star as testified by Jurey, by any witness for petitioners.

Going now to the cuts and openings on the Midas and Evening Star, existing now and in September, 1913.

CUT "21" ON MIDAS, THE DISCOVERY POINT.

Respondent's testimony is abstracted to record on Ex. No. 1, pp. 491-497, and it will serve no purpose to repeat

it here. The witnesses testified positively to the existence of the vein, its walls, strike, dip, etc., and mineralized vein matter. Compare with petitioners' testimony at Exhibit No. 1, Sec. 452, pp. 459-462. Of the latter Moran testified he saw nothing in way of a vein or lode disclosed, but Phillips suspected it enough to take a sample there and have it assayed, while Boyle saw what he termed the "fracture zone" (Exhibit No. 1, p. 461, Rec. p. 413-4), on which the shaft was sunk, and showed traces of copper stain. He took a sample of the best looking material on the dump, but did not put the assay in evidence. Admits there are barren spots in all veins, and that there might be some rock in that vein which he did not assay, and which would be of commercial value. He didn't see the bottom of the cut, for there was snow in it, and he did not get down in the cut. (Exhibit No. 1, pp. 461.) (Ante p. 87.)

The above neither disproves the vein, nor prior discovery, nor contradicts respondent's testimony above cited.

CUT "23" ON THE MIDAS.

Respondent's testimony at Exhibit No. 1, Sec. 463, pp. 497-8. This cut was made since September, 1913, but the evidence was admissible under 15 Nev. 383, and petitioners' present admission in brief. Sample taken across one foot in width of vein, showing assay in gold, silver and copper of $3.05. Compare petitioners on this cut at Exhibit No. 1, page 462, Sec. 453, where Phillips

says there was no lode exposed, but he took a sample from there for some reason. And he must have suspected a vein, unless they want to admit he was sampling against us from common country rock. We must remember they were demanding commercial ore, hence anything under that they considered themselves entitled to overlook in their category of veins. (Ante p.....)

TUNNEL NO. 22 ON THE MIDAS.

Respondent's testimony in Exhibit No. 1, Sec. 464, pp. 499-505, driven in solid rock 25 to 40 feet or more in 1912 (pp. 499, 504), 25 feet more in 1913, was in 75 feet in all (R. p. 356). Vein descending from roof of tunnel on its dip, 16 inches wide, exposed in both sides of tunnel for 20 feet until it dipped into the floor of tunnel. Well defined vein, filled with soft, porous crushed material of different character from surrounding wall rock. A mineral-bearing vein. Sampled systematically by witness Tibby, samples assayed, and assay values shown ranging from $2.89 to $11.87. (Exhibit A, pp. 505 and 506). Compare with petitioners at Exhibit No. 1, Sec. 456, pp. 463-471, where their man Healey says there was a "streak" with an upper and lower wall but not a mineral-bearing vein in his judgment. Their Phillips says there was a "fracture" with altered and decomposed material in it. Took a sample from this tunnel but not from the vein or fracture, which assayed naught. Their Moran says there is a fracture in this tunnel 16 or 18 inches wide, which comes out to the mouth of the tunnel on its dip. And mineral

might be deposited in it. If it assayed $11.50 in gold, silver and copper would call that a fair assay, yes; would develop it further. Their Boyle says a "selvage or crossing of material" shows in that tunnel that came nearer a commercial vein than anything he saw on the claims. Took an assay that was in evidence at the last trial, but not at this. Also took a sample No. 10 which assayed $1.46 in gold and silver. What assays he might have got if he had kept sampling witness did not say. Admits that if $11.50 assays were obtained from there it was commercial ore, and locatable as a claim. Has potential values as a mine. (Exhibit No. 1, pp. 469-471.) (Ante p. 88-89.)

CUT NO. 20, EVENING STAR.

Respondent's testimony in Exhibit No. 1, Sec. 465, pp. 505-509, sample from 10 inches of quartz in roof of a cross-cut driven from bottom of shaft, heavily iron-stained silicious material; vein must have been exposed by the work done before September, 1913, because the cut could not have been dug at all without exposing the vein. It not clearly appearing the point in vein surface where sample was taken was exposed before September, 1913, the sample therefrom showing $1.95 values was rejected. Joseph Jurey knew of this vein however in 1912. He had been watchman, foreman and custodian there for many years. Tibby's samples showing $.68, $1.27, $1.09 and $1.78 in values admitted. A big wide vein traversing right through the country, of quartz nature.

Compare with petitioners at Exhibit No. 1, pp. 472-3 All their witnesses saw no vein, or what they would consider to be such, but Moran said there was material in there that was brown stained, and that all the country rock is not so stained. Took samples there, no assays. (Ante p. 89.)

CUT NO. 24, EVENING STAR DISCOVERY POINT.

Respondent's testimony in Exhibit No. 1, Sec. 496 at pp. 509-512. Crushed quartz material showing iron stains with distinct walls dipping easterly, running from surface to bottom of cut, sampled the vein; it is approximately 50 inches between walls, running northerly and southerly, and considered to be a continuation of vein at cut "20"; same in material except more altered by exposed position at cut "24." Took sample, assay 83 cents.

Compare with petitioners at Sec. 459 of Exhibit No. 1, pp. 473-5. Their Healey said there was leached quartzite but no vein in that cut, yet took a sample there which assayed $1.23 (see his sample No. 6 at rec. p. 805); while Boyle took a sample there which assayed 97 cents. From what their witness Moran said (Exhibit No. 1, p. 474) the material in this cut is broken up, pulverized, and very difficult to classify, so highly altered is it. Doesn't believe an expert geologist could determine its character. Witnesses simply don't know. As geologists they were out of their depth. (Ante p.....)

With this resume, we submit the case as to veins and lodes on respondent's plus petitioners' showing. What-

ever else may be observable, it can be safely stated there was no evidence to disprove discovery or prior knowledge by the locators of these veins, coming as they do right out to the surface of the ground. No witness has kept tab on the comings and goings of people for the last generation or so, to say who has or has not visited the ground and obtained the knowledge obtainable by a most casual search for veins. No one to tell us what was observable in the bottom of the various half-filled shafts on the ground that were not prospected to its former depth by any witness at the trial, nor included in the foregoing account. A mineralized vein in any one of these would support the claim on which it is found, regardless of the original discovery. (Mining Co. vs. Tunnel Co., 196 U. S. 337, 348-352; 25 Sup. Ct. 266; 49 L. Ed. 501.)

Certainly there is no ground for the suggestion in the dissenting opinion below, and quoted with much fondness by petititoners, that the effect of U. S. R. S., Sec. 2332, as applied by the majority opinions, would enable parties to obtain title to non-mineral land without a discovery.

# VI. The Yellow Jacket Location.

## VI. THE YELLOW JACKET LOCATION.

There are numerous other vital errors by the trial court, any of which would suffice for reversal. We feel that we need not tire the court further in narrating the same. They are presented in our briefs, Exhibits A and No. 1.

But there is one affecting the Midas and Evening Star, that we feel we must direct the court's attention to. It is that by which without an issue in their complaints, they sought to invalidate these two locations at the trial by evidence as to an alleged prior location to the Midas and Evening Star, to wit, the Yellow Jacket. We cannot do better than refer to Exhibit 1, at pages 530-540, and request the court to read it. The Yellow Jacket was respondent's own property by the same chain of title as the Midas and Evening Star locations, and even were there conflict, which was not proved, one would not destroy the other. ~~It must be proved, one would not destroy the other~~. It must be proved, in such case, that the Yellow Jacket was in existence, and outstanding in the hands of a third party, to affect the Midas and Evening Star. Willison vs. Ringwood, 190 Fed. 549, following the U. S. Supreme Court in Lockhart vs. Farrell. Yet the trial court actually charged the jury that they might consider the Yellow Jacket evidence as invalidating the Midas. (R. p. 1230.) It was assigned as error No. 52.

For these and numberless other reasons, the Circuit Court of Appeals was bound to have reversed the trial court judgment.

## CONCLUSION.

We ask this court in its decision to so declare the law as in the event of a new trial the principles of law upon the principal questions in the case will be clarified and repetition of previous errors avoided. The main and concurring opinions in the Circuit Court of Appeals leave room for contention upon practically the only question there decided; i. e., as regards the presumptions and the burden of proof and of the issue, as witness the petitioners' briefs in this court. While if U. S. R. S., Sec. 2332 be applied in its thoroughness according to the decisions of this court we have cited herein, there will be nothing to contend about at the next trial.

Again the reaffirmance of Belk vs. Meagher, 104 U. S. 279, as regards the effect of a relocation of a previous mining claim will settle matters entirely as to the Salt Lake No. 3-Guy Davis controversy (record No. 569). (See infra p. 58.)

And an application of primary principles of decision to the lack of interest, title or cause of action in petitioners shown by the facts cited to the record in topic I, Appendix (infra p. 50), will dispose of the Midas and Evening Star vs. the Homestake controversy (record No. 568).

We respectfully ask that these principles be applied to shorten and terminate a controversy barren of justice

or equity on the part of petitioners, and which has already found lodgment in the courts for over six years.

Respectfully submitted,

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